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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 220

LAWRENCE W. BAGGETT, ROCKY BAUER, Z. W. BIRNBAUM, JOOST E. BUSINGER, ISABEL S. CARO, GIOVANNI COSTIGAN, J. G. DASH, WILLIAM A. DAWSON, JAY PATRICK DONALEY, DAVID M. EAVES, JOHN M. EMLEM, T. SAUNDERS ENGLISH, VICTOR ERLICH, ROBERT G. FLEAGLE, RONALD GEBALLE, PATRICK T. GOLDSWORTHY, MILTON P. GORDON, ALVIN D. GREENBERG, ROBERT E. GREENGO, GORDON GRIFFITHS, W. MARY GRIFFITHS, ISAAC HALPERN, ARNOLD HANSON, W. STULL HOLT, ABRAHAM C. KELLER, ARTHUR L. KOBLER, SCOTT LYTLE, ROBERT W. MACDONALD, D. F. MAGEE, HENRY W. MAIER, WILLIAM H. MATCHETT, KARL P. MAUZEY, TREVOR J. MCMINN, IRVIN MILOWE, ROBERTA MILOWE, WAYNE C. MULLER, RHOADS MURPHEY, DAVID S. NEWMAN, HOWARD NOSTRAND, GORDON H. ORIANS, SIMON OTTENBERG, JACK R. PARSONS, EUGENE C. PIZZUTO, MELVIN RADER, KENNETH EYRE READ, MAX SAVELLE, ANNICK SMITH, C. A. VALENTINE, LESLIE WARNER, JAMES B. WATSON, WALTER B. WATSON, PHILIP E. WILCOX, THEODORE W. WILCOX, WILLIAM B. WOOLF, PAUL DIETRICHSON, JON BRIDGMAN, BORIS A. JACOBSOHN, PATRICIA J. KELLER, LUCILLE L. CURTIS, ALBERT NUJENHUIS, RICHARD MORRILL, WILLIS KONICK, ROBERT G. CLARKE, THEODORE LANE,

Appellants,

v.

DOROTHY BULLITT, JOSEPH DRUMHELLER, JOHN L. KING, HERBERT S. LITTLE, E. A. ADDINGTON, JOHN J. O'CONNELL, CHARLES E. ODEGAARD, HAROLD S. SHEFELMAN, ROBERT J. WILLIS,

Appellees.

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 220

LAWRENCE W. BAGGETT, et al.,
Appellants,
v.
DOROTHY BULLITT, et al.,
Appellees.

BRIEF OF APPELLANTS

ON DIRECT APPEAL FROM THE FINAL ORDER OF A THREE-JUDGE UNITED STATES DISTRICT COURT SITTING IN THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

OPINION BELOW

The unanimous opinion of the three-judge United States District Court, rendered February 9, 1963, has been reported in 215 F. Supp. 439 (W. D. Wash. 1963). A copy of this opinion and the judgment and final order in this case have been printed in the Record at pages 235-264.

JURISDICTION

This class action was filed on June 6, 1962, in the United States District Court, Western District of Washington, Northern Division, by sixty employees of the State of Washington employed at the University of Washington. (R. 1-6.) This suit was filed pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1983. *Bell v. Hood*, 327 U.S. 678. The complaint prayed that two statutes, and their required

oaths, of the State of Washington, on their faces and as they have been sought to be applied to appellants, and others similarly situated, be declared and adjudged, by the District Court, to be unconstitutional, void and of no effect, and that certain named state officials, and their successors, be permanently enjoined from further enforcing, operating and executing said statutes, and their required oaths, and that appellants be granted costs, and other equitable relief as may be proper. (R. 12.)

Upon the filing of the complaint a three-judge district court was convened pursuant to 28 U.S.C. §§ 2281 and 2284, and on July 13, 1962, it heard arguments on appellants' motion for an interlocutory injunction and on appellees' motions to dismiss. The motions to dismiss were denied, except as to four student plaintiffs, appellants here, who were dismissed from this action by the District Court. (R. 44.) A temporary injunction was granted pending a full hearing on the merits. (R. 234.) Several lengthy pre-trial hearings were held; an extensive pre-trial order was prepared containing many stipulations, including one that no oral testimony would be presented at hearing, but that, without objection, the testimony of several persons would be, and has been, set forth in the pre-trial order, and another stipulation that a number of exhibits were admitted without objection. (R. 48-83, 88-234, 279-317.) After hearing and opinion, the District Court, on February 25, 1963, entered a final judgment and order in this case that Chapter 377, Laws of Washington, 1955, was "not unconstitutional" and that no declaratory judgment would be rendered as to the constitutionality of Chapter 103, Laws of Washington, 1931. Its final judg-

ment ordered that the complaint of appellants be dismissed with prejudice. (R. 235-264.)

Notice of appeal to the Supreme Court of the United States was filed with the United States District Court, Western District of Washington, Northern Division, on April 23, 1963. (R. 265-274.) The Jurisdictional Statement was filed with this Court on June 20, 1963, and on October 14, 1963, this Court noted probable jurisdiction. (R. 318.)

The jurisdiction of the Supreme Court of the United States to review, by way of direct appeal, the decision in this case by the District Court, Western District of Washington, Northern Division, is conferred by Title 28, United States Code, Section 1253. The following decisions sustain the jurisdiction of the Supreme Court directly to review the judgment and order entered in this case: *Bailey v. Patterson*, 369 U.S. 31, *Shelton v. Tucker*, 364 U.S. 479; *Florida Lime & Avocado Growers, Inc., v. Jacobsen*, 362 U.S. 73; and *Palmetto Fire Ins. Co. v. Conn.*, 272 U.S. 295. And see *Gerende v. Bd. of Supervisors*, 341 U.S. 56; *Adler v. Bd. of Education*, 342 U.S. 485; *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Bd. of Higher Education*, 350 U.S. 551; *Sweezy v. New Hampshire*, 354 U.S. 234, *Speiser v. Randall*, 357 U.S. 513, and *Cramp v. Florida*, 368 U.S. 278.

UNITED STATES CONSTITUTIONAL PROVISIONS, WASHINGTON STATE STATUTES AND OATHS INVOLVED

The provisions of the Constitution of the United States of America which are involved in this case are: U. S.

Const., Article I, Section 10; Article VI, and Amendments I, V and XIV. Because of their lengths, the pertinent texts of these provisions have been set forth in Appendix A.

The statutes involved are: Chapter 103, Laws of Washington, 1931, (RCW 28.70.150, RCW 28.76.230) and Chapter 377, Laws of Washington, 1955, amending the Washington Subversives Activities Act, Chapter 254, Laws of Washington, 1951, (RCW 9.81.010 et seq.). These statutes and their required oaths are printed in Appendix A to this brief of appellants.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

A. *Whether two enactments of the Washington Legislature, Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, on their faces and as they have been sought to be applied to appellants, and to others similarly situated, are unconstitutional in that they are repugnant to the Constitution of the United States of America in the following respects.*

1. By violating the due process clause of the Fourteenth Amendment and through it the First Amendment to the United States Constitution, in abridging the constitutionally protected freedoms of religion, speech and conscience, association, assembly and academic freedom:

(a) By infringing upon each and every one of the constitutionally protected freedoms without an evidentiary showing made anywhere in the record that the state possesses a nexus, or a subordinating regulatory interest, which is compelling, or without any showing herein of

a need for the state to protect itself from a substantial danger, be that danger clear, present, or otherwise, existing by reason of the current or past employment at the University of Washington of advocates of the proscribed doctrines and associations, or by the employment of those persons who refuse or fail to promote "by precept and example" the doctrines required by the 1931 statute, or by the employment of appellants, and others similarly situated, who, for the reason of fear of possible recrimination and on the added grounds of conscience, academic freedom and constitutional liberty, refuse to sign the declarations demanded of them, that they do not so advocate or associate, or that they will so promote the state-approved doctrines;

(b) By infringing upon each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of unconstitutional conditions upon either the continued enjoyment of employment, or future employment, at the University of Washington by requiring that appellants, and others similarly situated, relinquish their constitutionally protected rights and freedoms as a condition precedent for their continued employment at the University of Washington, where, as in this case, the evidence and record are barren of any showing by the state of any danger which the state could properly abate, or which would justify the state's demand for an invasion and consequent relinquishment of said rights, and which would justify the imposition of conditions upon employees of the University of Washington which are incompatible with the conditions necessary for

an atmosphere of free inquiry and independent thought essential and necessary for realization of academic liberty at that University;

(c) By abridging each and every one of the constitutionally protected freedoms, particularly academic freedom, through the imposition of prior restraints upon appellants, imposed by language which is fluid, vague, shifting, speculative and uncertain, and through sanctions, including the threats of: discharge from their employment, guilt, infamy, scorn, disloyalty, findings of unfitness for employment, and prosecutions for subversion and/or perjury; thus, forcing appellants, and others similarly situated, to restrict their areas of constitutionally protected freedom; and where the herein described prior restraints are unnecessary because two available and adequate alternative procedures, having the same purposes as the oaths in issue, currently exist and are available, and are used, by the University of Washington, each such alternative is designed for a selective approach to this area rather than the blanket attack on constitutional freedoms curtailed by the oath enactments here in question;

(d) By infringing upon the constitutionally protected freedoms from the establishment of religion and/or abridging the free exercise thereof and freedom of conscience, through the necessary operation and compulsion of these enactments which function in an automatic and summary manner without affording appellant employees any opportunity to decline participation in the state prescribed ritual and without affording a hearing at which a refusal to participate could be explained, defended, or justified;

(e) By infringing upon each and every one of the constitutionally protected freedoms, and denying due process of law, because these enactments function in an arbitrary and discriminatory manner being summary and automatic, without affording appellants their following constitutionally protected rights: (1) to a reasonable notice of charges, (2) to a hearing, (3) to an opportunity to cross-examine witnesses supporting charges against them, (4) to an opportunity to present witnesses on one's own behalf, (5) to an opportunity to be represented by counsel, (6) to the presumption of innocence, (7) to have the accusing party carry the burden of proof, and (8) to avail themselves of the protections afforded by the rules of evidence; and such denial of constitutionally protected rights is accomplished by fluid, vague and indefinite standards thereby further deterring the enjoyment of constitutionally protected freedoms;

(f) By infringing upon each and every one of the constitutionally protected freedoms and due process of law, through statutory use of indefinite and vague standards, not susceptible of objective measurement, and which are so ambiguous, fluid and shifting that necessarily men of ordinary capacities, (including appellants), at their peril, must guess as to the meanings of these standards and are forced to speculate as to the nature of penal, and other laws that might be applied to them, thereby denying reasonable advance notice of the circumscribed areas of proscribed speech and association, subverting the presumption of innocence and shifting the burden of proof.

2. By violating Article I, Section 10, Clause 1 of the

Constitution of the United States, in that said enactments are Bills of Attainder, resulting in legislative infliction of pains, penalties, and punishment by conclusively presuming guilt, infamy, disloyalty and unfitness for employment at the University of Washington said legislative infliction of punishment and pain being made against appellants, and others similarly situated, without affording them their rights to trial or hearing, right to accusation, confrontation and cross-examination, or assistance of counsel, thus necessarily subverting the presumption of innocence, shifting the burden of proof, and altering the rules of evidence.

3. By violating the exclusively vested federal power over foreign affairs and by infringing upon the supremacy clause found in Article VI of the Constitution of the United States in attempting to regulate and restrict that sedition directed against the Government of the United States, and not being strictly confined to that sedition directed against the State of Washington, thereby impinging upon a field entirely within the province of the federal government, and which the President and Congress of the United States, by their exclusive powers as vested by the Constitution and by Congressional enactments, have preempted and wholly occupied.

4. By violating the due process clause of the Fourteenth Amendment, and through it the incorporated privilege against self-incrimination found in the Fifth Amendment, in abridging these constitutionally protected freedoms through the imposition upon appellants of a statutory requirement that appellants, and others similarly situated, as a condition of continued employment, give evidence

that may incriminate them, and otherwise bear witness against themselves.

B. *Questions relating to Chapter 103, Laws of Washington, 1931.*

5. Whether the District Court, after determining that Section 4 of the 1931 Act was clear and that it unambiguously operated in a summary manner: "There can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal to sign the oath," properly refused to enter a declaratory judgment and permanent injunction as to Section 4 of the enactment, inasmuch as it infringes upon and abridges constitutionally protected freedoms.

6. Whether the District Court, after determining that one section of the 1931 Act raised substantial constitutional issues, properly refused to render a declaratory judgment upon all the provisions of the 1931 enactment, prior to its actual enforcement, solely on the ground that the record fails to show that any appellant had "suffered actual injury by reason of the application of the oath of allegiance statute" (Chapter 103, Laws of 1931).

7. Whether the legislature of the State of Washington possesses constitutional power and authority to disqualify absolutely from the profession of teaching in any school, private or public, an otherwise fully qualified citizen of the United States of America on the sole ground that he refused, when requested, to testify that, *inter alia*, "he will by precept and example promote respect for the flag and the institutions of the United States of Amer-

ica and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

8. Whether the lower court properly held that all alien appellants, and others similarly situated, fail to present the requisite interest necessary to challenge the constitutional validity of the 1931 statute on the sole ground, contradicted by an express stipulation and exhibit in the record to the contrary, that the administering state officers intend to violate their statutorily imposed duties and to apply said statute unevenly, differentiating between aliens and citizens, by altering for aliens the prescribed statutory wording of the oath.

9. Whether the 1931 enactment is repugnant to the Constitution of the United States by violating the equal protection clause of the Fourteenth Amendment to the United States Constitution in arbitrarily requiring that said statutorily-worded oaths be executed by the citizen faculty members of the University of Washington of whom there ~~is less~~ need for said oaths, if any need exists at all, and not requiring exactly the same worded oath from the alien faculty members who are similarly situated and of whom there would appear to be greater need for said oaths, if any need be existing.

C. *Question Regarding Standing of Student Appellants.*

10. An additional question is whether the lower court properly dismissed four students of the University of Washington, non-employees, plaintiffs below, solely on the ground that they lack the requisite interest to challenge

the validity of the oath-requiring statutes here in question when their challenge to said enactments is taken on the ground of their rights to academic freedom and when this action adjudicates those constitutional rights and the conditions for realizing learning freedom at the University of Washington.

STATEMENT OF THE CASE

This case involves the power of a state legislature to classify American citizens and aliens for employment at the University of Washington through the use of test oaths based on speech and associations, and on the basis of their willingness to swear that by precept and example they will promote certain legislatively approved ends, including "undivided allegiance to government." More specifically, this case involves the power of a state legislature to demand that all members of the academic faculty, whether alien or citizen, and all state employees generally, abandon and/or deter their exercise of several of their constitutional rights to free conscience, speech, association and publication; and also that all faculty members swear that "by precept and example" they will "promote respect for the flag and institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States," as a necessary condition of qualifying for classification into a smaller group, from which, if substantively qualified, they may become eligible for employment at the University of Washington. The constitutional problems posed by these legislative classifications, it will be noted, arise in the vital, and fragile, areas of academic freedom, and affect the rights of free conscience, political speech, association and expression.

The University of Washington

The University of Washington is older than the State of Washington, and is one of two state universities. It is located primarily in Seattle, Washington. It employs many thousands of persons, and it offers academic, scientific, research and professional education in numerous fields to more than 25,000 persons annually (R. 89-90). The budget of the University derives about 60% from funds appropriated by the legislature of the State of Washington with the remaining 40% coming from diverse sources, the second largest percentage, 21%, coming from the federal government and private contract research. (R. 90.) In recent years, this second category of funds has been increasing in its percentage share of the total University budget (R. 90). That the University is one of our great institutions of higher learning and creative research in the United States is revealed by the activities it undertakes through its fifteen schools or colleges: The Graduate School; The College of Architecture and Urban Planning; The College of Arts and Sciences; The College of Business Administration; The College of Education; The College of Engineering; The College of Fisheries; The College of Forestry; The School of Nursing; The College of Pharmacy; The School of Social Work; The School of Librarianship; The School of Law; The School of Medicine; and The School of Dentistry. The anticipated future of the University is one of growth and expansion of students and faculty. It is expected that the University increasingly will become a center for graduate and advanced professional work, although retaining its commitment to a strong undergraduate program (R. 179). The educational and

research activities of the University of Washington are fully described in the Record at pages 89-150.

Appellants

Appellants in this case are sixty employees of the State of Washington, employed in various capacities at the University of Washington. (R. 151-6.) At least eleven of them earn a salary in excess of $10,000 annually. (R. 176.) Most of the appellants, including three tenured professors who are aliens, are tenured members of the faculty, and serve the University in both professorial and research capacities. Some appellants are faculty members without tenure, while a few have been hired on renewable three-year contracts (R. 294-5, 302-3), and the remaining appellants are non-tenured, non-teaching members of the University staff—several serving as research associates; one as a micrometeorologist; another is an assistant editor of the University of Washington Press; two are secretary-typists, and another is a detailer in the cyclotron department. (R. 151-6.)

The professorial appellants have been members of the University of Washington faculty from one to thirty-three years. They serve in many different schools and departments within the University and have distinguished themselves, and the University of Washington, in many respects: e.g., Born in Europe, Professor Z. W. Birnbaum, professor of mathematics, is Director of the University's Laboratory of Statistical Research. (R. 46.) Dr. Birnbaum has been employed by the University for 24 years and is an international scholar. His original education took place in Poland, and he later taught mathematics at the Uni-

versity of Lwow, Poland. (R. 46-8.) Professor Birnbaum engaged in post-doctoral study at the University of Goettingen, Germany. In addition to his education in mathematics and law in Europe, he has done mathematical research in the United States, and has received various fellowships, including a Guggenheim grant, which enabled him to carry out further studies. (R. 47.) Dr. Birnbaum has published one book, more than forty original research articles, plus a large number of other publications, such as book reviews, critiques, etc. (R. 47.) He is a member, and attends meetings, of many organizations limited to American membership, such as the American Mathematical Society and the Mathematical Association of America. (R. 48-51.) Also, he is a member, and attends meetings, of international organizations, such as the International Congress of Mathematicians and the Institute of Mathematical Statistics. (R. 50.) Professor Birnbaum attends these meetings as an official delegate from the University. (R. 52.) His membership in these organizations is a necessary part of his professional duties (R. 51, 58-9), and his attendance at the International Congress of the Institute of Mathematicians is sponsored by the U. S. Office of Naval Research. (R. 52.) These associations and meetings bring Professor Birnbaum, and others similarly situated, together with scholars from throughout the world, including communists who come from the Soviet Union and other Iron Curtain countries such as Poland, Hungary and Czechoslovakia. (R. 50, 51.) The communist scholars who attend these meetings can be expected to be interested in furthering the goals of the communist regime. (R. 57-8.) At these meetings, and elsewhere, Professor

Birnbaum associates with some of the most outstanding Russian mathematicians. (R. 50-1, 52.) He is the President-Elect of one of these international organizations, the Institute of Mathematical Statistics, and his work, as its officer, would require that he come into contact with, further the interests of, and aid, advise and teach, other scholars, including communist scholars from the Soviet Union, and other Iron Curtain countries, and including further, giving aid and assistance to those communist scholars who are seeking information, and who want to visit other countries, and who contemplate visits to the United States. (R. 53-7.) It is entirely feasible that the assistance, aid, guidance and teaching, that Professor Birnbaum renders to Soviet scholars, and other communist scholars, could be used by the Soviet Union government for military purposes (R. 55, 57), just as the United States government could, and does, use the information which it obtains from Professor Birnbaum. Professor Birnbaum cannot execute the required oaths and continue to engage lawfully in these associations and activities, particularly in those academic and professional activities necessary for the assimilation of international up-to-date research findings and of transmitting them to his colleagues and students. (R. 58-9, 67, 69, 71-2, 79, 80.) Professor Birnbaum fears that, were he to execute the oaths, then he might be found to be engaging in "subversive activities" or to be a "subversive person," or a member of a "subversive organization," or a "foreign subversive organization" (R. 67-8) and further, he fears the threat of perjury. (R. 68 and 80.)

Dr. Paul Dietrichson, an associate professor, is a Nor-

wegian citizen. His major field of study is philosophy, particularly existential philosophy and the metaphysical foundations of ethics. (R. 214.) Dr. Dietrichson has published articles and reviews in American and European journals and presently is the recipient of a grant from the David Swenson-Kierkegaard Memorial Fund to write a book on Kierkegaard's philosophy. He has published one book, Introduction to Philosophy. An alien, Professor Dietrichson refuses to execute the demanded oaths. (R. 214-18.)

Dr. Boris A. Jacobsohn is Director of the Summer Institute for Theoretical Physics at the University of Washington and is a senior faculty member in the Physics department. (R. 189.) Dr. Jacobsohn is an internationally known scholar, having collaborated on fundamental matters of physical theory, in mutual teaching, aid, advice and cooperation, with Dr. R. M. Ryndin of the Joint Institute for Nuclear Research, Dubna, Soviet Union. Their collaborative articles appear in 6 Physical Review Letters, No. 1, Jan. 1, 1961, and 24 Nuclear Physics 505-509 (1961). (R. 188-9.) Professor Jacobsohn expects to continue in these types of associations, but cannot execute the required oaths and engage in the type of activities described above. However, his continued participation in this type of activity is essential to his calling as a Professor of Theoretical Physics. (R. 189.)

Dr. Rhoads Murphey is professor of Geography and is a member of the Far Eastern and Russian Institute at the University of Washington. He has published a textbook, An Introduction to Geography (1961), and is the Editor of the Journal of Asian Studies, which is devoted to re-

search in the humanities and social sciences concerned with Asia. (R. 202.) In his latter capacity, and as a scholar in his field, Dr. Murphey is responsible for aiding, advising and teaching scholars throughout the world, including Communist academicians from the Soviet Union and Communist China. He must, and does, associate with them in foreign organizations. Dr. Murphey is a member, and attends meetings, of the International Congress of Orientalists which brings him into direct contact with international scholars, some of whom are Soviet and, more particularly, Chinese communists, and where Dr. Murphey engages in frequent meetings and discussions with them. (R. 203.) The International Congress of Orientalists surely is a "foreign subversive organization." Were Professor Murphey to sign the oath, he could no longer participate in these necessary associations. Nor could he "discuss in or outside of class controversial issues of several sorts which are important to a complete, honest, and objective presentation of the subject matter of the courses" in which he teaches and of the fields of academic exploration in which he works. (R. 203-6.)

Dr. W. Stull Holt is a professor of American History, and American Foreign Policy, serving the University of Washington since 1940, and having been chairman of that department for fifteen years. (R. 193.) Dr. Holt is the author of eight books and many articles. He has distinguished himself, and the University of Washington, in many ways, holding such titles as Advisor to the Officer of the Chief of Military History; Councilman of the American Historical Society; President of the Pacific Coast Branch of the American Historical Society, etc. Dr. Holt

has served the United States in two World Wars, being decorated in World War I with the American Silver Star and the French Croix de Guerre, and in World War II with the American Bronze Star and the British O. B. E. (Officer of the Order of the British Empire). (R. 194.) Professor Holt refuses to sign oath Form A because were he to sign, then he would either have to violate his oath, thus risking the penalties of loss of employment, perjury, and abridging his conscience, or he would have to abide by his oath and inject the required, but historically incorrect, doctrines into his teaching, and make numerous changes in both his scholarship and attitudes, and in his public and private expression of his political and related views. (R. 195-6.)

Dr. Melvin Rader is a professor of social and moral philosophy and aesthetics, and has, with distinction, served the University of Washington and the academic community for thirty-three years. Dr. Rader is an internationally known scholar and author, being highly respected for such books as: A Modern Book of Esthetics (3rd ed. 1960); No Compromise (1939); Ethics and Society (1950), and The Enduring Questions (1956). He will publish another book, Ethics and the Human Community in 1963. (R. 206-8.) Professor Rader has authored articles, or parts of books, such as "Soviet Communism" found in Twentieth Century Political Thought (1946); "The Moral Basis of Peace" and "International Protection of Individual Freedom Within the State" in If Men Want Peace (1946); "Soviet Ideals and Postwar Cooperation" in Moscú, Soviet Far East and Pacific Northwest (1944), and "On Teaching Communism in the Public Schools."

U. of W. College of Education Record, May 1962. (R. 208.) Since Dr. Rader is professor of social and moral philosophy he open-mindedly must deal directly with the original source materials of Communist thought and ideology. He frequently studies, and he requires that his students read, and master, such items as Marx's, The Communist Manifesto, and The German Ideology, and Lenin's, The State and Revolution.

There can be no doubt of Professor Rader's commitment to the Constitution of the United States and its Bill of Rights, and he has twice been chairman of the American Civil Liberties Union of Washington. (R. 209.)

However, Professor Rader has been a member of several organizations which seemed to have justified, in the minds of some, an investigation, in 1948, of Professor Rader by the Washington Committee on Un-American Activities. After its investigations, the Committee charged him, in a unanimous report to the 31st Washington Legislature, January, 1949, with having committed perjury before it, and with having been closely associated with twelve organizations which had been officially cited as Communist fronts and subversive. (R. 210-11.)

The three reports of this committee have been made part of the record in this case, but these reports have not been reproduced in the printed record because of their lengths. (R. 230.) However, all the pertinent sections of the report of the Washington Committee on Un-American Activities made to the 31st Washington Legislature, January, 1949, which singled out Professor Rader for special commentary to the 1949 Legislature of the State of Washington, are reproduced verbatim below:

MELVIN RADER

"In the case of Melvin Rader, Associate Professor of Philosophy at the University of Washington, the Committee's investigating staff and an agency of the Federal Government have produced evidence showing conclusively that Professor Rader did not tell the truth when he testified before the Committee.

"Mr. Rader was identified by one George Hewitt, a former member of the National Committee of the Communist Party, as having attended the Briehl school in Communist training in New York State in the summer of 1938 or 1939.

"The precise summer was later established as that of 1938.

"Mr. Rader testified that during the period in question he taught at the University of Washington summer school and that he spent a vacation at Canyon Creek Lodge near Granite Falls.

"Your Committee's investigators have established that Mr. Rader's first appearance at Canyon Creek Lodge was in August of 1940, and that there was a six-weeks' period when he did not teach summer school at the University in 1938.

"The Federal agency heretofore mentioned has in its possession the testimony of two witnesses who corroborate Mr. Hewitt's statement that Professor Rader was in New York in the summer of 1938.

"All of this evidence has been made available to the proper state authority and has been made available to the administration of the University of Washington and to the Board of Regents.

"The Committee's published report of the second public hearings does not disclose that Professor Rader refused to confront Mr. Hewitt and actually "ran out" on Mr. Hewitt.

"When Mr. Hewitt informed your Committee that he recognized Rader as a former attendant of the

Briehl school for Communist educators, your Chairman immediately invited Professor Rader to his office.

"Professor Rader came into the executive office but as soon as he saw Hewitt, and before a word had been spoken, he turned on his heels and said he refused to have any conversation. As Rader hurriedly left, Mr. Hewitt again identified him positively as the Mr. Rader that attended the Briehl school. Upon leaving the room Rader said he would not talk without his attorney. Your Chairman then courteously invited him to return with his attorney. Shortly thereafter, Attorney Ed Henry, claiming to represent Professor Rader, showed up but Rader was not with him.

"Professor Rader would have had every opportunity, had he returned with Henry, to examine and cross-examine Hewitt, as did Henry. Hewitt persisted in his identification but Rader was not there to offer any denial.

"Your Committee enters this in its report to the Legislature to contradict and refute the manufactured stories that Professor Rader was not given an opportunity to confront and question his accuser. There is no record of this in the Second Report because events herein related took place in the Committee's executive offices. This is the first time they are publicly disclosed.

"Professor Rader is shown by the fully authenticated and documented records of your Committee to have been sponsor for, speaker for, or to have been otherwise directly associated with, twelve organizations which have been officially cited as Communist Fronts and subversive.

"Your Committee feels that the perjury charge filed against Mr. Hewitt was not only hasty and unwarranted but of political significance.

"Your Committee feels that it would be a proper subject of inquiry for the Thirty-first Legislature to ascertain why the recently appointed Prosecutor of

> King County, after first admitting the validity of the evidence placed before him and definitely committing himself to seek dismissal of the perjury charge against Mr. Hewitt, later reversed himself and explained that: (1) he was committed to his predecessor, now a member of the Superior Court bench, not to do so; and (2) that it might cost him 12,000 votes when he runs for election to take such a step."

Subsequent investigations of Professor Rader's alleged attendance at the Briehl school in communist training, and his alleged associations with twelve subversive organizations, were conducted by many people, including Professor Vern Countryman of the Yale Law School, and now Dean of the School of Law at New Mexico, a local newspaper, the *Seattle Times*, and by Mr. Smith Troy, then Attorney General for the State of Washington. (R. 212.) These investigations established beyond all doubt that Professor Rader was actually in the State of Washington at the time the committee alleged that he was attending a New York school in communist indoctrination. (R. 212), and that, significant portions of the Report of Washington's Committee on Un-American Activities are absolutely false and without foundation in fact. After reviewing the unassailable evidence, University of Washington President, Raymond B. Allen, issued a statement completely exonerating Professor Rader. (R. 212.) A report of the Rader Case appears in Countryman, Un-American Activities In The State of Washington (1951). (R. 212.)

Nevertheless, several facts remain: three sworn witnesses impugned Professor Rader's truthful testimony; an official committee of the State Legislature unanimously charged him with false swearing; a New York judge as-

serted that Professor Rader should be the subject of a grand jury investigation; his reputation was clouded; Professor Rader's academic employment was in jeopardy for a year; his credit rating fell, and, during that time, Professor Rader was frequently attacked in the newspapers (R. 212). The Un-American Activities Committee Chairman, Mr. A. F. Canwell, repeatedly called for Professor Rader's prosecution for perjury, and, on at least one occasion, a radio broadcaster reported that Professor Rader was a communist. (R. 212.) In a libel suit, Professor Rader later collected damages from the radio broadcaster. (R. 212.)

The attacks made upon him are not events of the remote past, but continue to the present day, due, in part, to the past record. Professor Rader has continued to be the subject of recent attacks, made by newspaper and otherwise, to the effect that he is still a member of communist front organizations; that he continues to hew to the communist party line, and that he is a master of deceit, each of which is false. Professor Rader cannot sign the oaths, because, were he to do so, then, it is not at all unlikely that he would be charged with perjury. (R. 212-3.)

It would unduly lengthen this statement to review the history of each remaining appellant. They have distinguished themselves in many ways, bringing scholarly respect to the University of Washington. For many of them, the performance of their academic duties necessarily brings them into close collaboration and association with communists, and several teach, advise and aid com-

munists in many ways, and by many means, some of which may very well help the Soviet Union and Communist China achieve their military and other purposes. A few of the many achievements and academic distinctions, along with several of their necessary associations with communists, appear in the pre-trial order (e.g., see Drs. Wilcox, Dawson, Fleagle, English, and Keller (R. 191, 192, 193), and Professor Valentine. (R. 196-9.)

Two appellants, Drs. Matchett and Orians, and others similarly situated, are members of the religious order known as the Society of Friends (Quakers). (R. 189.) They refuse to execute the oaths on religious grounds which are protected by the First Amendment to the Constitution of the United States of America.

Additional Operative Facts

It has been expressly agreed and stipulated that at all times material to the issues in this case, appellants, and others similarly situated, have refused to sign all oath forms which have been demanded of them and continue to do so; that appellants, and others similarly situated, have no speedy or adequate remedy at law, and that "unless defendants are restrained from enforcing the provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs (appellants) and others similarly situated, will suffer irreparable injury not compensable in monetary damages." (R. 174.)

Appellees, defendants below, are members of the Board of Regents, Charles E. Odegaard, President of the Uni-

versity, and John J. O'Connell, Attorney General for the State of Washington. (R. 156.)

Since the 1955 statute, in question in this suit, was enjoined for seven years from 1955 to 1962, appellees during that time required no oaths, either the oath required by the 1955 or 1931 statute, of any employee, and none was administered to employees of the University of Washington. (R. 165-9.) During that time, and to the present, the appellees, Board of Regents, President of the University and the Attorney General, have been and are without knowledge that any University of Washington faculty member, student, graduate or ex-student or any guest, visitor or listener to public lectures at the University of Washington has been charged in any judicial proceeding brought under the Washington Subversive Activities Act. (R. 187-8.)

Nor, has any official agency of government, local, state or federal, brought facts to the attention of any of the appellees that, as a result of the teachings and activities of appellants, and others similarly situated, any student or ex-student of the University is in violation of Washington's Subversive Activities Act, and further, appellees are without knowledge that any appellant, or others similarly situated, in any way, uses his position of employment to engage in or promote activities designed to achieve the violent overthrow, by force, of national or state governments. (R. 187-8.)

Dr. Charles E. Odegaard, President of the University of Washington, stated that oath forms A and B (absent statutory requirements) are not necessary qualifications

of fitness to teach or to do research at the University of Washington; that the existing recruitment and personnel procedures practiced at the University during the past seven years, as improved from time to time, are adequate to protect the legitimate public interest in securing qualified and trustworthy personnel, and that some qualified applicants for academic positions have been reluctant to accept employment on the condition of executing oath forms A or B. (R. 178.)

Glenn Leggett, Vice Provost of the University of Washington, is in charge of supervising academic personnel records. He stated that a physicist who previously had been hired by the University of Washington, resigned, accepting a position at the University of Birmingham [Birmingham-Southern at Birmingham, Alabama], when informed that execution of the oaths, required by the statutes here in question, were conditions precedent to academic employment; that, in 1962, after dissolution of the injunction in *Nostrand v. Little*, 58 Wn.(2d) 111, 361 P.(2d) 551, 362 U.S. 474, 368 U.S. 436, and the resumption of the oath requirements which had been enjoined since 1955 (R. 185), several executive officers of the University indicated to him that the University would be less successful in its academic recruitment policy, and further, that one professor who was then negotiating an academic appointment with the Department of Philosophy, refused a position at the University of Washington because, in part, he would have to execute the oaths in issue in this case before he could qualify for academic employment as a philosopher. (R. 184-5.)

In accordance with the facts of their knowledge, appel-

lants can testify that they have not, and do not, use their positions of employment at the University of Washington in any such ways as knowingly to bring about violent overthrow, by force, of state or national governments. (R. 175.) It is further stipulated and agreed that:

"23. Unless defendants are restrained from enforcing the provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs, and others similarly situated, will suffer irreparable injury not compensable in monetary damages." (R. 174.)

"22. Plaintiffs . . . have no speedy or adequate remedy at law." (R. 174.)

"41. All plaintiffs are of the opinion that if they executed the oaths in question said execution would cause each of them emotional anguish due to having to compromise their principles, beliefs and consciences." (R. 188.)

"42. All plaintiffs fear that if they executed either Oath forms A or B that they may subject themselves to harrassment and the threat of prosecution for perjury." (R. 188.)

"38. All plaintiffs are of the opinion that they cannot execute Oath Form A or B and that they refuse to swear or affirm that they 'understand and are familiar with the contents' of RCW 9.81.010(2), (3) and (5); RCW 9.81.060; RCW 9.81.070, and RCW 9.81.083, and RCW 28.70.150, 'subject to the penalties of perjury.'" (R. 188.)

"40. All plaintiffs are of the opinion that the requirement that they sign the oaths in question is an affront to their personal and professional integrity, an abrdigement of their civil liberties and constitutional rights secured and guaranteed under the First, Fifth and Fourteenth Amendments to the Constitution of the United States." (R. 188.)

"21. At all times material to this cause, plaintiffs, and others similarly situated, have refused to execute the oath forms demanded of them and continue to do so." (R. 174.)

The Statutes In Issue

The sole issue in this case is the constitutionality, on their faces and as sought to be applied herein, of several statutes of the State of Washington, and their required oaths (R. 158-162, 170), as set out in Appendix A hereto. Although the District Court declined to make any findings of fact, which had been requested by counsel, the operative facts in this case are undisputed, there being no evidence in the record to rebut them. (R. 222, 45-83, 88-238, 279-317.)

The 1931 Statute

In 1931, without holding any hearings on the subject and without previously making any findings of supportive facts of an existing evil which the state has power to abate, the Washington legislature enacted Chapter 103, Laws of Washington, 1931, Section One of which sets forth, in statutory terms, the following oath:

"I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States." (R. 158.)

Section One of the 1931 statute further provides that the taking of said oath shall be an absolute and mandatory condition precedent for each and every person applying for, or renewing, a contract to teach in the State of Wash-

ington. If this required oath is not executed annually, then, as the section provides: "No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation." (R. 158.)

No person in the State of Washington is qualified to engage in the profession of teaching, in public or private schools, without first having obtained prior state approval. (See Chapter 97, Subchapter 4, Article VII, § 1, p. 306, Laws of Washington, 1909, and *State ex rel Shoreline School District No. 412 v. Superior Court*, 55 Wn.(2d) 177, 346 P.(2d) 999) And, since no person in the State of Washington can legally obtain a certificate to teach or enter into a teaching contract without executing the above stated oath, it stands as a mandatory condition precedent for each person to execute prior to his entry into the teaching profession or prior to his executing a contract to teach in that state. Section Two of the 1931 Act demands that the oath of undivided allegiance be sworn to by every "professor, instructor or teacher employed by any state institution of higher learning . . ." (RCW 28.76.230.) Any contract entered into without the prescribed oath having been subscribed to is, automatically, rendered null and void by Section Four of the 1931 Act, and any affiant who subscribes falsely to the statutory oath of undivided allegiance, in addition to loss of employment, subjects himself to possible perjury prosecution, punishable by imprisonment in the state penitentiary for not more than fifteen years (RCW 9.72.010, et seq.). The 1931 enact-

ment, as the District Court declared, operates automatically, thereby excluding all possibilities of a hearing where a tenured or non-tenured faculty member at the University of Washington, be he alien or citizen, could explain, defend or justify his refusal to subscribe to the oath.

The 1955 Statute

In 1955, and without holding any hearings, and without previously making any findings of supportive facts of an existing evil which the state has power to abate, the Washington legislature enacted Chapter 377, Laws of Washington, amending the 1951 Subversive Activities Act (RCW 9.81.010 et seq.). This amendment sets forth a requirement in addition to those imposed by the 1951 Subversive Activities Act, *viz.*, that the official heads of each state agency, thus including the Board of Regents of the University of Washington, shall require that each and every employee, or applicant for state employment, at every such agency, thereby including all members of faculty and staff of the University of Washington, shall state under oath whether or not he or she knowingly is a member of the communist party or other subversive organization, or is a subversive person as those terms have been set forth in the definitional sections of the 1951 Subversive Activities Act. (R. 170-173.). This 1951 Act, like the 1955 Act, is included as part of the penal code of Washington, and through it various crimes of subversion are denounced. Printed forms of the required oath (see Appendix A) in the following language have been distributed to all employees of the University.

"I further certify that I have read the provisions

of RCW 9.81.010(2), (3) and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

"I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

"I understand that this statement and oath are made subject to the penalties of perjury." (R. 170.)

This last quoted sentence, required by express statutory enactment (RCW 9.81.110), calls into play the Washington perjury statute (RCW 9.72.010), and, in addition to loss of employment, that statute makes any knowing misstatement in the oath form subject to the penalties of perjury, carrying a term of imprisonment in the state penitentiary for not more than fifteen years.

Section 1 of the 1951 Subversive Activities Act (Chapter 254, Laws of Washington, 1951, RCW 9.81.010 et seq.) makes the following definitions of Subversive Person, Subversive Organization, and Foreign Subversive Organization:

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets; advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3)

hereof, becomes or remains a member of a subversive organization or a foreign subversive organization." (R. 171.)

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence." (R. 172.)

"*Communist Party Declared to Be Subversive Organization.* (This section was added by the 1955 Act.)

"The communist party is a subversive organization within the purview of Chapter 9.81 and membership in the communist party is a subversive activity thereunder." (R. 172.)

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (R. 172.)

This last section is not qualified in any way by terms such as overthrow of government by *force, violence* or *revolution*.

The remainder of the 1951 Act is briefly described. Section 2 of the 1951 Subversive Activities Act, not directly in issue in this case, but relevant to it, makes it a felony to engage in certain defined "subversive activities"; these definitions of crime are more expansive, but highly similar to those definitions found in the oath required by the 1955 Act here in issue; Section 3 makes it a felony to remain or become a member of a subversive organization or foreign subversive organization knowing such organization to be such. Section 4 disqualifies persons found guilty under Sections 2 or 3 from holding public office and from voting in state elections. Section 5 provides for the dissolution of such organizations and the distribution of their property. Sections 6, 7, 8, 10 and 21 were vetoed, and Section 9 requires that the attorney general report to the governor and legislature biennially.

Section 11 absolutely disallows any "subversive person" from eligibility for all state employment and public office. Sections 12 and 13 require that each board or agency of state government institute independent procedures to determine whether any employee is a "subversive person," and Section 14 requires that every state employee, as of June 1, 1951, submit a written statement to his agency to the effect that he or she is not a "subversive person," and that if an employee fails to submit the statement or submits an admission that such employee is a "subversive person," then he "shall immediately be discharged." Section 15 requires the discharge of any "subversive person" if reasonable grounds exist to believe that any state employee is such, and Section 16 requires that all candidates for public office file an affidavit that he is not a "subversive

person.". Section 17 makes any misstatements by employees punishable as perjury, and Section 18 is a severability clause. Section 19 states that the Act shall not be construed so as not to authorize civilian or military censorship or as to infringe upon freedom of speech or other constitutional guarantees. Section 20 provides the short title of the Act, "The Subversive Activities Act," and Section 22, the final section, declares that the Act shall take effect immediately.

The definitional sections of the 1951 Act, set forth above and incorporated into the 1955 Act, have twice been passed upon by the Washington State Supreme Court (*Nostrand v. Balmer*, 53 Wn.(2d) 460, 335 P.(2d) 10, and *Nostrand v. Little*, 58 Wn.(2d) 111, 361 P.(2d) 551) (R. 165-68.) The Washington court has authoritatively construed the reach of the definitional sections holding, over argument to the contrary, that these sections extend to the limits of their literal breadths. The breadth of these authoritative constructions were ignored by the District Court when it passed on the issues below.

In *Nostrand v. Balmer*, *supra*, counsel for respondent-professors argued, among other contentions, that the sweep of the definitional sections of the Act, incorporated into the oath, abridged the professors' freedom of speech and assembly as they are protected by the First and Fourteenth Amendments to the Constitution of the United States. (Brief of Respondents, pages 43-59; *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477). Counsel for respondent-professors, citing *Sweezy v. New Hampshire*, 354 U.S. 234, urged that the Washington Supreme Court construe

the Washington Subversive Activities Act in a manner similar to that employed by this court, with reference to the Smith Act, in *Dennis v. U. S.*, 341 U.S. 494, and *Yates v. U. S.*, 354 U.S. 298. (Brief of Respondent, pages 39-43). However, the Washington court refused so to limit the applications of the definitional sections of the 1951 Washington Subversive Activities Act, incorporated into the 1955 Act. (R. 167.)

On remand, in *Nostrand v. Little*, *supra*, the breadth of the definitional sections was not in issue, this Court having remanded that case solely on the question whether, before their dismissal for refusal to execute the required oaths, professors were entitled, under the Subversive Activities Act, to a hearing where they might explain or justify their refusal to sign. However, the Washington State Supreme Court, *sua sponte*, discussed the breadth of the Washington statutes and compared them with the breadth of Arkansas statutes which had been found, by this Court, to be unconstitutionally broad because the statutes asked of Arkansas teachers more than that necessary to effectuate the state's legitimate interests. *Shelton v. Tucker*, 364 U.S. 479. The Washington court held that "[un]like the Arkansas statute, our Act is not too broad in its scope." *Nostrand v. Little*, 58 Wn.(2d) 111 at 130.

The 1955 amendment to the 1951 Subversive Activities Act provides that "refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for a refusal to accept his or her application for employment." This amended statute likewise has been authoritatively construed by the Washington State

Supreme Court. (R. 168.) In an earlier case, the Washington Supreme Court held that neither the 1955 amendment nor the 1951 Subversive Activities Act affords professors a hearing where they might explain, defend or justify their refusal to take the oath. (R. 168, 169.) (*Nostrand v. Little*, 58 Wn.(2d) 111, 132, 361 P.(2d) 551, 564.) In addition, the Washington Supreme Court held, over argument to the contrary by the state attorney general, that Washington's model state administrative code (Chaper 234, Laws of Washington, 1959, RCW 34.04.010 et seq.) does not entitle professors at the University of Washington to a hearing should they refuse to execute the oath; the model administrative code of 1959 "was not intended to supersede established procedure adopted by the regents . . . there is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington, which have been in effect for fifty years." (*Nostrand v. Little*, 58 Wn.(2d) 111, 132, 361 P. (2d) 551, 564.) But, the Washington Supreme Court did declare that, if a professor should refuse to execute the oath, then, before dismissal, he will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations . . ." (*Nostrand v. Little*, 58 Wn.(2d) 111, 131, 361 P.(2d) 551, 563.)

Under the provisions of Chapter 25 (Exhibit No. 3) of the administrative code governing the University of Washington at the time of the decision in *Nostrand v.*

Little, supra, a full-time member of the faculty had tenure if "he is a professor or associate professor . . ." or if he has held any full time faculty rank continuously for six years, and certain other minor categories not here important. Holding of tenure means that "no faculty member having tenure as defined . . . shall be removed from his position or subjected to discriminatory reduction of salary until he has been given opportunity for a hearing . . ." (See Chapter 25 of the Administrative Code of the University of Washington found in Appendix to *Nostrand v. Little, supra.*) The tenure provisions of the administrative code of the University of Washington do not apply evenly to all academic positions below the rank of associate professor; thus, many assistant professors, most instructors, and all lecturers, pre-doctoral associates, teaching fellows, and all members of the faculty on acting or visiting or research appointments, etc. do not have tenure and are not entitled to a hearing before their discharge, for failure to execute the disclaimer oath as required by the 1955 amendment to the Washington Subversive Activities Act of 1951.

Administrative Rulings with Regard to Tenure

Washington law expressly vests final control over the university in an administrative board, the University's Board of Regents, providing that (RCW 28.77.130):

> "The Board of Regents shall:
> (1) Have full control of the university . . . and employ members of the faculty who shall hold their positions during the pleasure of the board of regents;

At its meeting on May 25, 1962, and after the decision of the Washington State Supreme Court in *Nostrand v. Little, supra,* the Board of Regents of the University of Washington, making specific reference to the 1955 amendment and to the 1951 Subversive Activities Act, changed the administrative code governing the tenured faculty members of the University of Washington. (R. 169.) The Board ruled that a new ground for dismissal of tenured faculty members had been added to the administrative code: to wit, failing to execute the oaths here in question as required by State law. (R. 173-4.) The relevant minutes of the May 25th meeting, pages 16-17, reveals that the Board of Regents ruled that:

> "If any member of the faculty having tenure should fail to comply with the requirements, be given notice of termination, and appeal to the tenure committee, it should be indicated that the grounds for termination are failure to comply with provisions of Washington state law which is binding upon the Board of Regents."

> "They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, *maintaining and retaining, however, the responsibilities and obligations of the Board of Regents as defined in the laws of the state of Washington.*" (emphasis in original)

> "In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow the customs of tenure described in Chapter 25 of the Faculty Code. The Board, however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the state of Washington and, therefore,

cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath." (The relevant portions of the Minutes of May 25, 1962, appear in Appendix "B," attached hereto.)

The responsibilities and obligations of the Board of Regents in relation to the disclaimer oath are imposed by the laws of the State of Washington—one of them is in question in this case—Chapter 377, Laws of Washington, 1955. This law directs that the Board of Regents "shall require of every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party, or other subversive organization and refusal to answer shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (R. 172-3.) Another statute, found in the 1951 Subversive Activities Act, Chapter 254, Laws of Washington, 1951, Section 14, requires that employees make written statements under oath; it provides further responsibilities and obligations of the Board of Regents that "Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged." (R. 173.)

On May 28, 1962, after the Board's change in the Administrative Code regarding tenure, and upon advice from defendant John J. O'Connell, Attorney General for the State of Washington, defendant Charles E. Odegaard, President of the University of Washington, acting upon the direction of defendant regents, demanded that each

and every employee of the University of Washington, including all members of the faculty, alien and citizen, tenured and non-tenured, execute an oath form, either form A or B, which would satisfy the requirements of the above described statutes as they may apply individually to each employee. (See Appendix A and R. 158, 168-9, 176.) Oath forms A and B were distributed (R. 23, 24, 31, 184) and demands were made upon all employees, faculty and non-faculty, to execute them; whereupon, some employees did execute said oath forms and other employees, appellants here, and others similarly situated, resisted. (R. 34-5, 303-4.) Oath form A, applying to the teaching faculty, carries two oaths, and was designed to satisfy the oath requirements of both Washington statutes involved in this case. Oath form B, applying to non-faculty, non-teaching employees, carries an oath designed solely to satisfy the requirements of the 1955 statute (Appendix A and R. 168-9).

This suit, a class action under Rule 23 (a) of the Federal Rules of Civil Procedure was instituted on June 6, 1962. (R. 1-2, 174.)

SUMMARY OF ARGUMENT

I.

The 1931 and 1955 oath statutes of the Washington legislature have been sought to be applied to appellants, professors, researchers and other employees of the University of Washington (R. 176), in violation of appellants' rights to freedom of conscience, speech, association and assembly guaranteed by the First and Fourteenth Amendments.

The attempt by the legislature here is not one of legislative inquiry, seeking to gain information upon a subject area over which it may legislate. The attempt here is to see to it that professors, and others, at the University of Washington, abstain from engaging in certain kinds of speech and associations which are fully protected by the First Amendment, but which the Washington legislature requires to be abandoned, and/or deterred, as a condition of continuing University employment; and further, the attempt here is to prescribe that certain other speech and conduct, "by precept and example," must be undertaken and executed by every professor as non-substantive conditions of his university employment, or else his teaching contract "shall be and is hereby declared to be null and void." Ch. 103, Section 4, Laws of Washington, 1931. "If he declines to sign, the employee is subject to immediate discharge." *Nostrand v. Little*, 58 Wn.(2d) 111 at 125 (1961).

The destructive impact upon freedom of academic and political expression arising from an application of test oaths to professors, and other university employees, has

been abundantly demonstrated over the past several decades. It is now clear that a state's legislative power to prescribe test oaths and other conditions of employment on a university campus is limited by the First and Fourteenth Amendments. *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Bd. of Higher Education*, 350 U.S. 551; *Sweezy v. New Hampshire*, 354 U.S. 234; *Shelton v. Tucker*, 364 U.S. 479, and *Cramp v. Florida*, 368 U.S. 278.

In many cases, e.g., *Noto v. U. S.* 367 U.S. 290; *Scales v. U. S.*, 367 U.S. 203, and *Yates v. U. S.* 354 U.S. 298, this court has announced that state power does not extend to control and regulate hortatory speech which advocates the moral propriety of forcible overthrow of government, short of incitement to action to that end, nor may a state control a person's knowing, but inactive, membership in organizations that actively espouse forcible overthrow. This principle draws the line between peaceful change and threats of immediate violence, and excludes the peaceful areas from regulation by state legislation. Yet, it is precisely these areas which the 1931 and 1955 oath enactments seek to enter and control. The breadth of the oaths goes well into the areas of peaceful social change, academic discussion and knowing, but inactive, membership. At these points, the Washington legislature transgressed the bounds of legitimate state power, and appellants are justified in invoking the First Amendment (*DeJonge v. Oregon*, 299 U.S. 353; *Wieman v. Updegraff*, *supra*, and *Sweezy v. New Hampshire*, *supra*) and appellants are justified in standing silent (*Shelton v. Tucker*, *supra*; *Speiser v. Randall*, 357 U.S. 513, and *West Va. v. Barnette*, 319 U.S. 624) and in not executing the 1931 or 1955 oaths.

This Court has set forth the principle that when a state legislature seeks to control freedom of expression and free conscience that: (1) there must exist a subordinating state interest; (2) there must be a substantial relation between that freedom regulated by a state legislature and the state's subordinating interest; (3) the legislative control can only extend precisely, and no further than that necessary to vindicate the state's interest, and (4) the burden of demonstrating each of the above, (1), (2), and (3), is upon "the state convincingly [to] show . . ." *Gibson v. Florida*, 372 U.S. 539, and *Am. Comm. Ass'n v. Douds*, 339 U.S. 382. The record in this case is barren of any legislative justification for the 1931 or 1955 oath statutes. Whether one applies a literal interpretation of the First Amendment, the clear and present danger test, or a balance of interests test, the 1931 and 1955 oath statutes must be precluded from an application to appellants, and others similarly situated.

We respectfully submit that the balance of interests test is fallacious and should be overruled, at least in the area of academic freedom.

A fundamental principle of the First Amendment is that where a state can, and does, show a subordinating regulatory interest, meeting each of the conditions above, *Gibson v. Florida, supra*, then "[i]n a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479 at 488. The 1931 and 1955 oath statutes, in their inner webbing, pre-

sent a total of over 51,000 permutations and combinations (Ex. 14), each of which is a separate method of legislative control over appellants' freedom of expression and free conscience. It cannot be doubted that they broadly stifle fundamental personal liberties. The breadth of this "legislative abridgement must be viewed in light of less drastic means for achieving the same purpose." *Shelton* at 488. The record in this case reveals that the purpose of the 1931 and 1955 oaths is also being thoroughly, but selectively, achieved by several other means, less drastic in breadth of abridgement, and currently functioning on the University of Washington campus. Thus, the 1931 and 1955 oath statutes function as prior restraints on First Amendment freedoms, and must be precluded from an application to appellants, and others similarly situated.

The oaths unjustifiably invade appellants' First Amendment rights to freedom of, and from, religion,—the core of which is freedom of conscience. No justification for such invasion has been made, and appellants cannot refrain from participating; thus, their rights to free conscience have unconstitutionally been abridged.

II.

The Washington oath statutes, and their required oaths, also contravene the due process clause of the Fourteenth Amendment in that no hearing is afforded appellants in which it could be determined whether their non-execution of the oaths was excusable or justifiable, because, under the statutes, no such grounds can be accepted by any hearing officer. The Washington oath statutes, and their

oaths, are arbitrary, *Slochower v. Bd. of Higher Ed.*, 350 U.S. 551, and indiscriminately lump the innocent with the guilty, *Wieman v. Updegraff*, 344 U.S. 183, and shift the burdens of persuasion and proof, under the threats of dismissal and/or perjury prosecution, *Speiser v. Randall*, 357 U.S. 513.

III.

The Washington statutes and their oaths also contravene the due process clause of the Fourteenth Amendment in that they deter freedom of expression because each is stated in such fluid, vague and uncertain language that it is impossible to ascertain its meaning or limit its scope to situations properly within state authority. The 1955 oath is particularly sweeping having been construed by the Washington Supreme Court to extend to its literal breadths. *Nostrand v. Little*, 58 Wn.(2d) 111 at 130. No professor at the University of Washington can be sure where the oaths end; nor can he be sure that wholly innocent and well-intentioned conduct on his part will not subject him to dismissal and/or perjury prosecutions.

Such uncertainty plainly fails to meet the requirements of due process that legislation must be framed in sufficiently clear terms to permit those subject to it to know "where this new standard of guilt would draw the line between the allowable and the forbidden . . ." *Winters v. New York*, 333 U.S. 507 at 519, and *Cramp v. Florida*, 368 U.S. 278.

IV.

Historically, test oaths have been stricken by this Court as Bills of Attainder. *Cummings v. Missouri*, 71 U.S. (4

Wall.) 277. The test oaths involved here are not retrospective, but current and prospective. Recently, this Court has erroneously accepted the principle that a Bill of Attainder must be retrospective, and it has erroneously abandoned its functional approach to this clause. See Comment, The Bounds of Legislative Specifications, 72 Yale Law J. 333 (1962). We submit that this Court ought to restore its historical interpretation of this clause —a broad functional approach, and that under it, the 1931 and 1955 oaths are Bills of Attainder.

V.

The Washington statutes, and their oaths, are invalid because, in most respects, upheld by the District Court, below, they deal with the field of national sedition, an area pre-empted by existing Federal legislation, *Pennsylvania v. Nelson*, 350 U.S. 497, and because they materially interfere with Federal cultural and educational exchange programs. No alien professor can reasonably be expected to execute the oaths in question. To uphold state power in this area would enable state legislatures to nullify the realization of legitimate Federal goals.

VI.

The 1931 and 1955 oath statutes establish a penalty, or forfeiture, within the scope of the Fifth Amendment's protection against self-incrimination, and, under penalties of perjury, the statutes require that an employee incriminate himself with respect to his own disloyalty; thus they violate the Fifth Amendment which, we submit, should be incorporated into the Fourteenth Amendment.

VII.

A District Court cannot properly refuse declaratory relief where several material and independent sections of the 1931 enactment are clear and unambiguous. *NAACP v. Bennett*, 360 U.S. 471 and *Harrison v. NAACP*, 360 U.S. 167. In these circumstances, it is the duty of the District Court to decide the constitutional question. *Toomer v. Witsell*, 334 U.S. 385. In no event is it proper to dismiss appellants' complaint "with prejudice."

VIII.

The oath statutes are not relevant to fitness of qualifications to teach at the University of Washington, as clearly revealed by the record showing the past administrative practice. The legislature has no power to disqualify every citizen absolutely from the profession of teaching on criteria that bear no reasonable relationship to qualifications of fitness, but it seeks to do so by the 1931 and 1955 oath statutes, and as such, the Washington legislature has transgressed the bounds of due process of the Fourteenth Amendment.

IX.

Academic freedom has two sides,—learning freedom as well as teaching freedom. *Barenblatt v. U. S.*, 360 U.S. 109 at 112. Students at the University of Washington have a substantial interest in learning freedom, and it would be materially reduced by the application of the 1931 and 1955 oaths to their professors. Fear would stalk the classroom. Thus, the four students, who are appellants here, have a vital interest in learning freedom. Their interest is substantial enough to enable them to have stand-

ing to sue, and the District Court committed error in not so holding.

ARGUMENT

I.

The 1955 Oath Statute, Determining a Class of Persons Eligible for State University Employment on the Basis of Their Speech, Association and Expression; and the 1931 Oath Statute, Requiring, *Inter Alia*, That Professors Swear to Promote Undivided Allegiance to Government, Contravene the First Amendment as Applicable to State Action Under the Fourteenth Amendment.

This case involves the effort by the Washington legislature to force appellants, and others similarly situated at the University of Washington, to abandon several of their constitutional rights as a condition of academic employment. That appellants must forego certain rights to speech, associations, publications and other activities, as a condition of University employment, was recognized by the lower court when it said that, by these oaths, appellants are "required to state that they do not now and will not in the future engage in the proscribed subversive conduct nor become or remain a member of a subversive organization as defined in the statute." (215 F. Supp. at 448.) What the lower court failed to explore and measure, but what has been discussed in this brief, is the nature and the breadth of the oath statutes, thereby identifying the type and number of cherished rights which must be abandoned. The two oath statutes impose an oath of "undivided allegiance to government"; and they define a "subversive person," "subversive organization" and "foreign subversive organization" in language which is so broad and pervasive as to encompass wholly innocent political activities

and certain other activities essential for appellants to perform as they practice their academic professions. These political and academic activities, prohibited by the 1955 and 1931 oath statutes, are fully protected by the First Amendment. Thus, the conditions that appellants must meet in order to continue in their employment at the University of Washington are those of giving up absolutely several of their First Amendment freedoms and deterring their free exercise of others.

It should be noted that this case presents issues of freedom of speech and conscience in one of their most significant and sensitive contexts—the area of academic freedom. In essence, the attempt by the Washington legislature to impose oaths upon the faculty and other employees of the University of Washington is to bring conformity to bear upon the classroom and research activities of professors, and others, who may want to discuss and research areas other than those lying within the prescribed orthodoxy of the oaths. The statutes in question deter the free exercise of many First Amendment freedoms in addition to requiring faculty members to abandon others. The statutes accomplish the deterrence by confronting non-conforming faculty members with the real possibility of perjury prosecutions, or threats of perjury prosecutions, and threats of continuing investigations of their classroom lectures and research activities in order to ferret out subversives and/or those who have falsely sworn. Such conduct on the part of a state government casts a pall of orthodoxy over a university and runs directly counter to the principles of free expression which underlie our democratic form of government and which are

embodied in the First and Fourteenth Amendments as consistently interpreted by the decision of this Court.

Nevertheless, the State of Washington demands that its otherwise fully qualified professors take thought-and-action-conforming oaths as a condition of their continued employment. Professors, under these oaths, are forbidden to discuss or to teach certain doctrines and, by "precept and example," they must promote others. The University of Washington is forbidden to employ believers in certain political or economic creeds. Thus, these enactments present great dilemmas to the academic community, for, in fact, they prevent that community from following the free ways which are at the very core of its being. If a professor abides by these enactments, then, by as much as he observes the law, he ceases being involved in a truly intellectual endeavor. If the professor disobeys these enactments and carries out his professorial calling, then, he is a lawbreaker. The First Amendment, as applicable to state action under the Fourteenth Amendment, denies a state legislature power to force an otherwise fully qualified professor to make this choice where, as this record reveals, there is no subordinating state interest.

A. The Prior Cases Decided By This Court Are Not Adverse to Appellants' Claims in the Case at Bar.

In several respects, the case at bar differs fundamentally from the past decisions of this Court. One significant distinction is that this case does not involve any inquiry, or questioning, by state officials seeking information. An honest inquiry would, of course, be a legitimate state function, calling other considerations into play. The at-

tempt by the legislature here is not one of gathing data. In this case, appellants are not asked to specify, particularize, elaborate, discuss or to present any facts or opinions. What professors and researchers are required to do, in order to qualify for continuing university employment, is to give one, and only one, answer—the right answer, and it has been prescribed by the legislature. In short, professors of researchers must agree with the majority of the legislature or lose their jobs, and suffer the taint of disloyalty.

Under penalties of perjury and/or dismissal, all professors must swear, *inter alia*, that "by precept and example" they will "promote . . . undivided allegiance to government," and that they are not, and will abstain from becoming, "subversive persons," or members of "foreign subversive organizations," or "subversive organizations," or of the communist party. All professors must either hold, and continue to hold, to these legislatively prescribed views, an official orthodoxy, and continue to abstain from the legislatively prohibited speech and associations, or they may "seek private employment." (*Nostrand v. Little*, 58 Wn.(2d) 111 at 131.) If professors should refuse to swear, as set forth above, then, "their refusal to do so renders them ineligible for further employment," (*Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477, also see p. 483.) "If he declines to sign, the employee is subject to immediate discharge." (*Nostrand v. Little*, 58 Wn.(2d) 111 at 125.) There is no possibility of a hearing where any reason for not executing the 1931 or 1955 oaths could be accepted as an excuse or justification for such non-

execution. (See, *infra*, Argument, Part II.) Like *Cramp v. Florida*, *infra*, refusal to execute these oaths results in an employee's immediate discharge.

It is clear that by the 1931 and 1955 oath statutes, the legislature is not seeking to be enlightened, nor is it interested in gathering information. What it wants is the right answer, which is to say, that the legislature is not looking for legislative data from appellants. Thus, many of the prior decisions of this Court do not control the adjudication of this case because, in those past cases, the legislature, or state official, was appropriately seeking information, and it was blocked by a refusal to answer. In those cases, the legislature was not trying to coerce one and only one answer which it had earlier prescribed to be the only acceptable one, and, furthermore, a meaningful hearing was afforded in each instance. Several such cases, heavily relied upon by appellees, are, *Adler v. Bd. of Ed.*, 342 U.S. 485; *Barenblatt v. U. S.* 360 U.S. 109; *Beilan v. Bd. of Ed.* 357 U.S. 399; *Braden v. U. S.*, 365 U.S. 431; *Cohen v. Hurley*, 366 U.S. 117; *Communist Party v. S. A. C.*, 367 U.S. 1; *In re Anastaplo*, 366 U.S. 82; *Konigsberg v. California*, 353 U.S. 252 and 366 U.S. 36; *Lerner v. Casey*, 357 U.S. 468; *Nelson v. Los Angeles*, 362 U.S. 1, and *Wilkinson v. U. S.* 365 U.S. 399.

The case at bar is fundamentally different from *Garner v. Bd. of Public Wks.*, 341 U.S. 716, greatly relied upon by appellees. This Court's opinion in *Garner* discussed only the Bill of Attainder and ex post facto points. It did not explore, nor discuss, the First Amendment issues raised in *Garner*, nor are they similar to those in the case

at bar. This Court disposed of the First Amendment contentions in *Garner* by simply citing *United Public Workers v. Mitchell*, 330 U.S. 75 (*Garner* at p. 721.) Although nothing in *Mitchell* justifies the restrictions on speech and association made in this case, the citation of *Mitchell* may well have been appropriate in the context of the *Garner* case because the two cases presented identical interests, which differ from the interests presented here. *Garner* dealt with a city's interest in preserving the integrity of its municipal civil service and *Mitchell* with the federal government's interest in the integrity of the federal civil service. Thus, at most, it can be seen that this Court had adjudicated only the interests of a state with regard to the integrity of its civil service employees.

This Court assumed that knowledge was part of the *Garner* oath, and it did not consider, nor adjudicate, whether the mere presence of knowledge alone necessarily insulates every oath from the possibility of infringing upon First Amendment freedoms. Subsequent cases indicate that knowledge alone is not sufficient. *Speiser v. Randall*, 357 U.S. 513; *Shelton v. Tucker*, 364 U.S. 479, and *Cramp v. Florida*, 368 U.S. 278.

Garner did not consider the interests of a state, nor those of a professor, nor those of society in academic freedom on a university campus. *Garner* does not speak to this set of relationships. That the interests of both a state and an employee in the municipal civil service differ materially and fundamentally from a state's interest in its professorial faculty and a professor's interest in academic employment cannot be denied. This Court has

considered this set of relationships in a more recent case, *Sweezy v. New Hampshire*, 354 U.S. 234, and it balanced the interests contra to *Garner*, indicating that this Court has drawn a line between these two different sets of interests. Also, in *Speiser v. Randall*, 357 U.S. 513 at 527, this Court distinguished the *Gerende*, see *infra*, and *Garner* cases on the ground that in those cases there was "... no attempt directly to control speech but rather to protect from an evil shown to be grave, some interest clearly within the sphere of governmental concern." An analysis of the 1931 and 1955 oaths in the case at bar reveals that the Washington legislature has attempted to control the speech of professors.

Whatever interest a state may have in minimally restricting the speech and association of its municipal civil servants as a condition of their employment *(Garner)*, that interest is, obviously, not of the same order as is its interest with respect to the speech and associations of university faculty members. To the contrary, the legitimate interests of a state in a free society, and the interests of a professor at a free university, within that society, are not in conflict, but in harmony; they unite to further all the freedoms of speech, association and peaceable assembly of all faculty members, thereby encouraging the pursuit of truth and the acquisition of knowledge for the entire community. See Machlup, On Some Misconceptions Concerning Academic Freedom, 41 A.A.U.P. Bull. 753 (1955); Ingraham, Academic Freedom, 101 Proceedings of the Am. Phil. Soc'y 441 (1957); and Symposium, Academic Freedom, Law and Contemp. Problems 431-671 (1963).

The approach of this Court when adjudicating issues involving the First Amendment, as well as other constitutional issues, is circumspect, and its adjudication goes forth carefully on a case by case analysis. *"In each case* courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid danger." *Dennis v. U. S.*, 341 U.S. 494 at 510. (Emphasis supplied.) In every case, final decision "is a question of proximity and degree." *Schenck v. United States*, 249 U.S. 47 at 52. Carte blanche citation of cases, without discriminating analysis, is not enough. *Garner v. Bd. of Pub. Wks., supra*, does not control the issues in the case at bar. (For further discussion of *Garner* and *Adler v. Bd. of Ed., infra*, see Morris, Academic Freedom and Loyalty Oaths, 28 Law and Contemp. Probs. 486, 502-510.)

There is need to locate the point at which the First Amendment operates as a limitation on state power to require oaths as a condition of state employment. This question is cleanly brought to issue in this case which unequivocally pits the First Amendment claims to freedom of religion, free speech and private association, including academic freedom, by faculty members and other employees, at the University of Washington, against the requirement that, as a condition of their continued employment, all members of the teaching faculty must execute two required oaths, and that all other employees must execute one of the two oaths.

This Court's disposition in *Gerende v. Bd. of Supervisors*, 341 U.S. 56, does not decide this appeal because

Gerende did not present the issues which are presented by this case. In *Gerende* this Court affirmed the judgment of the Maryland Court of Appeals on the understanding that "a candidate need only make oath that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government by *force or violence*', and that he is not knowingly a member of an organization engaged in such an attempt." This Court did not have before it the much broader and pervasive Section 15 of Maryland's Ober Act which defined a "subversive person" in language identical to that involved in this case. The Maryland Court had held that Section 15 did not apply to Gerende, *Shub v. Simpson*, 76 A.(2d) 332, at 341, thus the questions presented in this case have not been prejudiced by *Gerende*.

Nor do the employee dismissal cases foreclose the issues presented here. In *Beilan v. Bd. of Ed.*, 357 U.S. 399, a public school teacher was discharged for "incompetency" under § 1122 of the Pennsylvania Public School Code, because of his refusal, continued after a warning that failure to answer might lead to his dismissal, and after a hearing, to answer a question of his superintendent as to his membership in the Communist Political Association. This section of the Pennsylvania Code was not in issue in *Beilan*, whereas the Washington statutes are in issue in this case. But, more importantly, the procedures in *Beilan* were designed for identification and informational purposes only and not for exclusionary and dismissal purposes as are the Washington oaths. Thus, in *Beilan* the question before this Court was whether *Beilan* could be discharged for

blocking a legitimate inquiry of the state for identification and informational purposes. There is nothing in *Beilan* that holds that a state may discharge a person because he reveals that he is a member of the Communist Political Association. However, the case at bar does not present appellants with the middle ground of *Beilan* where they might give the demanded information and retain employment. A person must execute the oaths, questioned in this case, in order to be eligible for state employment; thus, the statutes here function to exclude employees from continued state employment, and they do so without a meaningful hearing, present in *Beilan*, where appellants might explain or justify their refusal to execute the oaths. Furthermore, the oaths here present a broadside attack on First Amendment liberties, going well beyond the simple question put to *Beilan* (see infra). Thus, in their breadth and in their broadside manner of infringement, the oaths demanded of appellants are controlled by the decision in *Shelton v. Tucker*, 364 U.S. 479, a case not decided at the time of the *Beilan* decision. Also, *Beilan* involved a selective and less drastic approach to the problem than do the oaths in this case. For these same reasons *Lerner v. Casey*, 357 U.S. 468, and *Nelson v. Los Angeles*, 362 U.S. 1, do not prejudice the questions presented in this appeal.

Other cases, such as *Konigsberg v. California*, 353 U.S. 252 and 366 U. S. 36, and *In re Anastaplo*, 366 U.S. 82, do not decide the issues presented in this case for many of the same reasons discussed above with reference to *Beilan*. But, in addition to those reasons, there is another. This Court has clearly indicated that there is a difference be-

tween a state offering a "privilege" and a state legislating conditions of state employment. *Konigsberg* and *Anastaplo* were decided on the theory that bar admission was a privilege:

> "Where, as with membership in the bar, the State may withhold a privilege available only to those possessing the requisite qualifications . . ." (*In re Anastaplo*, 366 U.S. 82 at 90.)

This Court, subsequent to *Adler v. Bd. of Ed.*, 342 U.S. 485, has clearly indicated that state employment does not fall into the "privilege" classification. *Wieman v. Updegraff*, 344 U.S. 183 at 192; *Torcaso v. Watkins*, 367 U.S. 488 at 495-96, and *Cramp v. Florida*, 368 U.S. 278.

However, as noted above, *Adler, supra*, was decided, in part, on the now discredited "privilege-of-state-employment" reasoning, and hence, either it loses much of its vitality, or the conflict in the opinions of this Court on this point indicate that *Adler* should now be expressly overruled. Furthermore, *Adler* was decided before this Court fully recognized constitutional protection for the right to private association, *NAACP v. Alabama*, 357 U.S. 449, and *Bates v. Little Rock*, 361 U.S. 516, relied upon here by appellants, thus *Adler's* holding that unexplained membership in a "subversive organization" might qualify as grounds for the dismissal of a teacher has been seriously impaired by this Court's cases subsequent to *Adler*.

In addition, *Adler's* holding does not decide this appeal because *Adler* was decided within the framework of viewing the state as a seeker of information, i.e., identification, a legitimate state purpose, and provision for a mean-

ingful hearing was afforded to the teachers. As pointed out above, Washington's oaths do not serve the purpose of information, i.e., identification, but rather, they are exclusionary, locating a class of persons who are eligible for employment, or continued employment, and locating them on the basis of their beliefs, speech and associations. No meaningful hearing is afforded in the case at bar. Finally, *Adler's* rationale and holding have been seriously undermined by two subsequent decisions of this Court; *Wieman v. Updegraff*, 344 U.S. 183, and *Speiser v. Randall*, 357 U.S. 513, and by the fact that *Adler* followed precedent *(Garner)* which was not in point. *Adler* decided that unexplained membership in a "subversive organization" might qualify a teacher for dismissal. This means that the teacher is considered as being a member of a subversive organization, and if he refuses to explain his membership, the question was whether he can be discharged. In *Adler*, the teacher was held to be a member of the organization, and, at page 492, this Court cited *Garner v. Bd. of Public Works, supra*, for its precedent on this point. However, *Garner*, at page 720, expressly said:

> "Not before us is the question whether the city may determine that an employee's disclosure of such political affiliation [in the Communist Party, U.S.A.] justifies his discharge."

Thus, it is clear then, in another respect *Adler* is defective, and cannot be relied upon to govern the issues presented in this case. For further discussion of *Garner, Adler* and other cases, in an academic freedom context, see, Morris, Academic Freedom and Loyalty Oaths, 28 Law & Contemp. Probs. 487, 502-510 (1963).

The prior cases decided by this Court are not adverse to appellants. The past precedents do not squarely decide the issues presented by this case — as admitted by appellees in their jurisdictional statement, submitted earlier in this case, and which has been filed with this Court, see p. 22: "This Court has decided no one case involving every issue . . . presented [in the case at bar] . . .". Therefore, an examination of appellants' constitutional rights, their abridgments and deterrence by the 1931 and 1955 oath statutes, and the state's interest in so doing are in order.

B. The 1955 and 1931 Oath Statutes, and Their Oaths, Materially Interfere With Appellants' Free Exercise of First Amendment Freedoms of Expression and Conscience.

The Rights Involved.

Previous decisions of this Court establish beyond all doubt that all the freedoms set forth in the First Amendment of the United States Constitution are fully protected from infringement by state action by the Fourteenth Amendment. (*Thomas v. Collins*, 323 U.S. 516, 530 (speech); *DeJonge v. Oregon*, 299 U.S. 353, 364 (assembly); *Lovell v. Griffin*, 303 U.S. 444, 450 (speech and press); *Staub v. Baxley*, 355 U.S. 313, 321 (speech); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (press); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (religion); *Shelton v. Tucker*, 364 U.S. 479, 486, 488 (association); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293, 296 (association); *Edwards v. South Carolina*, 372 U.S. 229 (speech, assembly and petition for redress of grievances).) Appellants invoke these constitutional rights in support of their positions herein; and particularly they invoke their

right to stand silent, *West Virginia v. Barnette*, 319 U.S. 624, and their right to academic freedom, *Sweezy v. New Hampshire*, 354 U.S. 234. (See Symposium, Academic Freedom, 28 Law and Contemporary Problems 431-671 1963).)

The areas of peaceful political expression and association have long been held to come within the protection of the First Amendment as it is enforced against state action through the Fourteenth.

This protection extends to expression of exhortation as well as to that of speech which is peaceful or academic, and which is of a less volatile nature. *Cantwell v. Connecticut*, 310 U.S. 296; *Terminiello v. Chicago*, 337 U.S. 1; *DeJonge v. Oregon*, 299 U.S. 353; *Dennis v. U. S.*, 341 U.S. 494, 501-2; *Yates v. U. S.*, 354 U.S. 298.

Indeed, peaceful association, peaceful discussion and peaceful worship, or freedom from compulsory worship, constitute the very purposes of the First Amendment. (See, Emerson, Toward A General Theory Of The First Amendment, 72 Yale L. J. 877.) And those purposes of the First Amendment have been awarded a preferred position in our constitutional scheme of things. This part of the First Amendment *does* stand in a preferred position. *Speiser v. Randall*, 357 U.S. 513; *Thomas v. Collins*, 323 U.S. 516, 527, note 12, 530; *Murdock v. Pennsylvania*, 319 U.S. 105; McKay, The Preference for Freedom, 34 N.Y.U. L. Rev. 1182 (1959); Cahn, The Firstness of the First Amendment, 65 Yale L. J. 464 (1956).

Given this scope and importance of free expression and

conscience under the First Amendment, it is little wonder then that academic liberty, its necessary associations, and the peaceful discussion and exploration of doctrines, even doctrines which themselves are unorthodox, Communist, Marxist or otherwise, are fully protected and come well within the ambit of constitutional protection against invasion by legislation of the state. *Sweezy v. New Hampshire*, 354 U.S. 234; *Dennis v. United States*, 341 U.S. 494, 501-2; *Yates v. United States*, 354 U.S. 298.

The very heart of this area is academic liberty which is invoked by plaintiffs here.

> "There is no freedom without choice, and there is no choice without knowledge — or none that is not illusory. Implicit, therefore, in the very notion of liberty is the liberty of the mind or absorb and to beget . . . At the root of all liberty is the liberty to know." Cardozo, Paradoxes of Legal Science (1928) p. 4.

This Court has indicated that the area of academic liberty is of special concern: "When academic teaching — freedom and its corollary learning — freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain." *Barenblatt v. United States*, 360 U.S. 109, 112. (See also (a) Hutchins, The Meaning and Significance of Academic Freedom, 300 The Annals 72 (1955); (b) Taylor, The Dismissal of Fifth Amendment Professors, 300 The Annals 79 (1955); (c) Barth, The Loyalty of Free Men, ch. 9 (1951); (d) Academic Freedom and Tenure in the Quest for National Security, 42 A.A.U.P. Bulletin 49 (1956);

(e) John F. Kennedy, Let's Get Rid of College Loyalty Oaths! *Coronet*, April, 1960): And, of course, if a state legislature has no power to investigate within this area, it certainly has no power to legislate over it.

> "There is no doubt that legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals. It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication, *particularly in the academic community.*" *Sweezy v. New Hampshire*, 354 U.S. 234, 245. (Emphasis supplied)

> "Probing into men's thoughts trenches on those aspects of individual freedom which we rightly regard as the most cherished aspects of Western civilization." Mr. Justice Frankfurter in *American Communication Assoc. v. Douds*, 339 U.S. 382 (concurring opinion).

More emphatically, in the *Sweezy* case, four mmbers of this Court held the view that:

> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (*Sweezy v. New Hampshire*, 354 U.S. 234, 250.)

The *Sweezy* case clearly recognizes, and gives protection to, academic liberty which is at the core of the First Amendment. It carves out of the First Amendment a preferred position for intellectual liberty, the essence of which is academic freedom. Six justices were in agreement on the following principle:

> "... petitioner's right to lecture and his right to associate with others were constitutionally protected freedoms which had been abridged through this investigation. These conclusions could not be seriously debated. . . . We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." (*Sweezy*, at page 250.)

The above statement appears in an opinion by the Chief Justice writing for four members of this Court in the *Sweezy* case.

The opinion of Mr. Justice Frankfurter, in which Mr. Justice Harlan joined, concurred in the result of the *Sweezy* case. But these two Justices went farther and grounded their views squarely upon the First Amendment. Under it they held that "the dependence of a free society (is) on free universities. This means the exclusion of governmental intervention in the intellectual life of a university. It matters little whether such intervention occurs avowedly or through action that inevitably tends to check the ardor and fearlessness of scholars, qualities at once so fragile and so indispensable for fruitful academic labor." 354 U.S. 234, 262.

Taken together, the opinions of this Court in the *Sweezy* case clearly establish that academic freedom and intel-

lectual liberty fully receive constitutional protection under the First Amendment as it is incorporated into the Fourteenth. This Court, itself, has recognized and officially endorsed, this view of the *Sweezy* case in *Barenblatt v. United States*, 360 U.S. 109, 129. The merit of intellectual liberties again was recognized in *Shelton v. Tucker*, 364 U.S. 479, 484, 485. There, this Court condemned a state statute as a prior restraint and spoke of it as invading a teacher's "rights to personal, associational and *academic liberty*, protected by the Due Process Clause of the Fourteenth Amendment from invasion by state action." (Emphasis supplied.)

There can be no doubt that academic freedom and intellectual liberty are constitutional rights of the University faculty members in this case and that they are fully protected from state infringement by the First and Fourteenth Amendments. The right to academic freedom is invoked here, and it is sought to be protected from being invaded by the 1931 and 1955 oath statutes here in question. We believe that the District Court, below, committed reversible error when it refused to recognize, and protect, this constitutional right of appellants, although these matters were fully briefed and argued. For further discussion see: Murphy, Academic Freedom—An Emerging Constitutional Right, 28 Law & Contemp. Probs. 447; Cowan, Interference With Academic Freedom: The Pre-Natal History of a Tort, 4 Wayne Law Rev. 205; Chapter V, Volume 2, Emerson and Haber, Political and Civil Rights in the United States (1958); and *Wieman v. Updegraf*, 344 U.S. 183 (concurring opinion).

The Constitutional Rights That Must Be Abandoned And/Or Deterred by the 1931 and 1955 Oaths If They are Applied to All State Employees, Including Professors

The extent of the invasions of liberty can be measured by the sweep of the various statutes which serve to define the oaths.

The Unconstitutional Breadth of the 1955 Disclaimer Oath

It is important to remember that the Washington State Supreme Court has carefully reviewed the sweeping breadth of the statutes defining the 1955 disclaimer oath. In an opinion, discussing *Shelton v. Tucker*, 364 U.S. 479, and other cases, the Washington Supreme Court declared that: "Unlike the Arkansas statute, our act is not too broad in its scope." *Nostrand v. Little*, 58 Wn.(2d) 111 at 130. The opinion of the District Court, below, considered *Sweezy v. New Hampshire*, *supra*, *Shelton v. Tucker*, *supra*, and *Cramp v. Florida*, 368 U.S. 278, and other cases. The District Court agreed with the Washington Court, holding:

> "Recent cases have made clear that a substantial invasion of such rights may not be justified by reliance on a state's right to inquire into the fitness and competency of teachers. But we find no such invasion of constitutional rights by the statute and oath in question here. A careful consideration of the language of the oath confirms the impression left by a cursory reading: namely, that the oath does not require any statement as to political, religious, economic or social beliefs of the person subscribing thereto, nor does it require him to refrain from membership in any kind of association whatever, *except* those associations

which have an aim or purpose to overthrow, destroy or alter the constitution and government of the state or nation by revolution, force, or violence."

"Foreign Subversive Organization"

That the District Court is flatly in error and misunderstands the breadth of the 1955 disclaimer oath is clearly demonstrated by reading the statutory definition of "Foreign Subversive Organization" which in no way is qualified and limited in its application only to those associations seeking change in government *by revolution, force, or violence*. The "foreign subversive organization" section, in its permutations and combinations, confronts an affiant with 16,200 questions, each of which is required by statute, and which an affiant must disclaim or be ineligible for state employment. There is no middle ground. Not one question is limited to membership in associations willing to use force or violence or engage in revolution as a means for social or political change (See Exhibit 14, pages 47 to 52).

One example will suffice: "Foreign subversive organization means any organization directed . . . indirectly by a foreign government . . . a purpose of which is to advocate . . . activities intended to . . . assist in . . . the alteration of the constitutional form of government of the United States or the State of Washington . . . and to establish in place thereof any form of government the direction and control of which is to be vested in . . . any foreign government, organization or individual." In application then, if the government of Australia were to advocate that we in America alter our constitution, by amendment, to vest

direction and control over nuclear weapons, and other military decisions, in the United Nations, then, according to this definition, each citizen of Australia, Professor Kenneth E. Read, appellant here (R. 199-202), would be a member of a "foreign subversive organization" and ineligible for professorial employment at the University of Washington.

Another, more immediate, type of problem suggests itself. Professor Rhoads Murphey is Professor of Geography and a Member of the Far Eastern and Russian Institute at the University of Washington (R. 202). He teaches courses requiring original and direct study of Chinese Communism, and he is editor of the Journal of Asian Studies published by the Association For Asian Studies (R. 202). As such, Professor Murphey represents this Association at the International Congress of Orientalists of which he is a member (R. 203). At these meetings Professor Murphey associates with, and, as editor, he advances the causes of the other members of the organization, many of whom are communists from China and/or the Soviet Union (R. 203). Given the expansive definition of "foreign subversive organization," counsel cannot advise Professor Murphey that he definitely is not a member of a "foreign subversive organization." Thus Professor Murphey is faced with a dilemma. To be safe he must withdraw from these types of organizations and activities, thereby depriving himself of speech, association and publication essential to the practice of his academic profession; or Professor Murphey must execute the oaths and continue these types of associations, thereby risking dismissal, and perjury prosecutions for having been a member of

a "foreign subversive organization." He refuses to execute the oaths, and whether Professor Murphey "remain[s] at the University of Washington will depend upon the outcome of this suit" (R. 202).

Not only do the 1955 and 1931 oaths require Professor Murphey to conform his out-of-the-classroom activities of speech, association and publication to what a majority of the Washington legislature believes to be appropriate, but the oaths also require that Professor Murphey control his lectures and activities inside the classroom to what a majority of the Washington legislature believes to be proper and correct, irrespective of their intrinsic intellectual merits.

> "If I signed the oath, I would not feel that I could discuss in or outside of class controversial issues of several sorts which are important to a complete, honest, and objective presentation of the subject matter of the courses which I teach and of the field in which I work. It is not possible, for example, to deal adequately with communism in China or with important aspects of the political and economic systems in India and southeast Asia without discussing controversial matters which I would not feel free to attempt if I signed the oath. The policy of the United States in those parts of the world and the administration of United States aid are also issues which require free discussion in the courses which I offer and which I would feel constrained from discussing freely. United States non-recognition of Communist China, the United States role in the Chinese civil war of 1947-49, the United States position on Formosa, United States military aid to Pakistan and Viet Nam, and United States policy toward India, including its policy on economic aid to India; may all legitimately be criticized and should be subjected to free discussion in any course dealing with the modern period in

> Asia. If the oath were imposed upon me, I would not feel that I could teach honestly and effectively. Similarly, in the course, Introduction to Geography, which I also offer from time to time, it is appropriate and necessary for me to discuss, among other things, United States policy toward the use of American resources, which may also legitimately be subjected to criticism, the role of superabundant natural resources rather than of a particular economic or political system in accounting for the development of a high standard of living in the United States, the virtues of the T.V.A. as a method of resource management, and the regrettable absence or weakness of planning in the growth of American cities. These and other controversial points are set forth in detail in Chapter 36 of my textbook, An Introduction to Geography, Rand McNally, 1961. If I signed the oath, I would not feel that I could discuss them, or encourage students to discuss them, and hence would not feel that I could in honesty teach." (R. 204-5).

Nor can an anthropologist, Professor C. A. Valentine, be expected to conform to the requirements of the 1931 and 1955 oaths and have fidelity to his necessary teaching and research activities (R. 196-9).

The expansive and unqualified statutory definition of "foreign subversive organization" has confronted Professor Murphey with a Hobson's choice. The dilemma is not unique with him. To the contrary, a large number of faculty members at the University of Washington are caught in the vise. For example, counsel cannot advise Professor Z. W. Birnbaum that he definitely is not a member of a foreign subversive organization, as defined by this statute and applied to Professor Birnbaum's Academic associations (R. 49-59). Nor can counsel give such assurances to Professors Wilcox (R. 191), Dawson (R. 192),

Fleagle (R. 192), English (R. 192-3), and Keller (R. 193).

But, if upheld, these oaths have another implication. The "foreign subversive organization" section of the 1951 Act, and the remaining definitional sections of the 1951 Act, included into 1955 oath, and the 1931 oath, all transgress, and will nullify, the policy of Congress which enables the President to provide, by grant, contract, or otherwise, for:

> "(1) *educational exchanges* (i) by financing studies, research, *instruction*, and other educational activities—
>
> "(A) . . .
>
> "(B) of or for *citizens and nationals of foreign countries in American schools and institutions of learning* located in or outside the United States;
>
> "and (ii) by financing visits and interchanges between the United States and other countries of students, trainees, *teachers, instructors and professors;*" (22 U.S.C. §2452) (emphasis supplied).

Professors who are citizens or nationals of foreign countries, e.g., Soviet Union, Poland, etc., will be disallowed, because they must execute the oaths before coming to the University of Washington, and, perhaps, to other state universities under the federal program outlined above. Nevertheless, the University of Washington, currently has, as do all great universities today, an extensive program whereby it invites foreign professors to join its faculty. This includes "visiting professors from communist countries" (R. 61, 191, 297). It is inconceivable that a professor from a communist country can, and will, honestly swear that he is not a member of a "foreign subversive

organization," or that "by precept and example" he will promote "undivided allegiance to the government of the United States." Yet, regardless of the past practice, the 1955 and 1961 oaths, as of May, 1962, have actually been demanded from aliens and citizens as conditions of University employment (R. 159). For further discussion see, *infra*, Part V on pre-emption.

"Subversive Person"

"Subversive persons" are defined by many gradations of speech and associations. But, as this Court pointed out in *Sweezy v. New Hampshire*, 354 U.S. 234 at 246, when it had statutes before it identical in wording with those in this case: this Court's "interest is in the minimal requirements of that definition since they will outline its reach." Accordingly, a "subversive person" is "any person who . . . teaches by any means any person to . . . aid in the commission of any act intended to . . . assist in the . . . alteration of the constitutional form of government of the United States, or of the State of Washington . . . by revolution, force or violence;" Thus, a professor who teaches his students "by any means" that the American Revolution was justified under the circumstances set forth in the Declaration of Independence, and that revolution would again be justified if American government degenerated to those conditions, would, by this definition, be a "subversive person." The "subversive person" section, in its permutations and combinations, presents 34,290 separate questions to an affiant, which he must disclaim or be ineligible for continued employment (Ex. 14, pp. 53-57).

Each question reveals the potential sweep of the stat-

utory definition of a "subversive person" and that it extends to speech and conduct which is only remotely related to actual subversion. When judging this section, this Court's comments on an identically worded statute were not followed by the District Court:

> "The possible remoteness from armed insurrection of conduct that could satisfy these criteria is obvious from the language. The statute goes well beyond those who are engaged in efforts designed to alter the form of the government by force or violence. The statute declares, in effect, that the assistant of an assistant is caught up in the definition." (*Sweezy v. New Hampshire*, 354 U.S. 234 at 246.)

The statutory declaration that the assistant of an assistant is a "subversive person" destroys all possibilities of meaningful academic collaboration between members of the University of Washington faculty and scholars from hostile and/or communist countries. Appellant, Boris Jacobsohn, professor of theoretical physics, has recently spent a year at Bern, Switzerland, co-authoring two original articles on nuclear physics with a Soviet scientist, R. M. Ryndin (R. 188). Professor Jacobsohn must continue in these types of collaborative research and publication efforts for they are "essential to the proper discharge of his duties as a professor of theoretical physics at the University of Washington." (R. 188-9.) But counsel cannot advise Professor Jacobsohn that he is outside the sweep of the statutory definition of a "subversive person." Counsel cannot assure Professor Jacobsohn, if he were to continue this type of research and scholarly activity, that he will not "by any means" intentionally have aided "in the commission of any act" assisting in the "alteration of the

constitutional form of government" by revolution, force or violence. Thus, the price Professor Jacobsohn must pay for continued state employment is that of giving up research and publication activities essential to his calling as a scholar; activities which are fully protected by the First Amendment.

This dilemma, caused by the oaths, is not unique to Professor Jacobsohn. In 1958, Professor Isaac Halpern of the Department of Physics (R. 152) jointly published an original and pathbreaking article on certain aspects of mathematical theory regarding angular distributions in nuclear fission. Professor Halpern's collaborator was V. M. Strutinski of the Institute of Atomic Energy of the Academy of Sciences of the U. S. S. R. Mathematically, they determined the directions in which the various fragments of a nucleus will diffuse whenever it is split. See I. Halpern and V. M. Strutinski, Angular Distributions In Particle-Induced Fission At Medium Energies, 15 Proceedings, The Second United States International Conference On Peaceful Uses Of Atomic Energy, 408-17 (U. N., Geneva, 1958). The front page of the European edition of the *New York Herald Tribune* for September 5, 1958, reported on this article as follows: "For the first time in history an American and a Russian have worked together on a problem in splitting the uranium atom. Their results . . . were said to have significantly advanced the knowledge of the process that yields atomic energy." As a physicist, Professor Halpern must continue these types of academic associations and publications, but he will have to forego them if the oaths are applied to him. Thus, it is unreasonable and unconstitutional for the Washington

legislature to demand, as a condition of professional employment at the University of Washington, that Professor Halpern swear that he will never "teach by any means any person to . . . aid in the commission of any act intended to . . . assist in the . . . alteration of the constitutional form of government . . . by revolution, force or violence." ("Subversive Person" definition.)

There is no doubt that appellant Philip E. Wilcox, like many other faculty members at the University of Washington, has taught, and has intended to give aid and assistance, as part of his academic duties, to members of the Soviet Union who may very well desire to "alter . . . the constitutional form of government of the United States . . . by revolution, force or violence." (R. 191). The same is true of Professors Fleagle (R. 192), Keller (R. 193), and Birnbaum (R. 52-9).

If appellants are to continue the types of associations, assistance and teachings necessary for fruitful academic work, counsel cannot advise them definitely that they will not be caught up in the assistant-to-the-assistant definition of a "subversive person," and become ineligible for further employment and a target for a perjury prosecution. Thus, they too, are faced with a Hobson's choice because of the 1955 oath requirements. They must either "play it safe," that is, abandon their constitutional rights, or continue their scholarly pursuits at the risks of dismissal and/or perjury prosecutions.

"*Subversive Organization*"

Washington's 1955 oath's final definition, that of "subversive organization," is sweepingly broad. A "subversive

organization" is "any organization . . . a purpose of which is to . . . teach activities intended . . . to assist in the . . . alteration of . . . government . . . by revolution, force and violence." Again, an assistant to an assistant is caught up by this definition, and it matters not whether the group be temporary or permanent. Suppose that a group were in existence only for the purpose of advancing all views on every subject, including, as one of its many views that of abetting, advising, or teaching, by any means, activities intended to assist another group in its attempts, or in its assistance to others who desire to alter government in the prohibited manner. Knowing membership in this first group is enough to qualify one as "subversive"; it need not be active membership. It is not possible under this statute, for a group member who is opposed to one of the group's purposes, say the one prohibited by this Washington statute, to remain a member of the group and to become, or remain, a state employee, even though he dissents from that particular purpose, is not active, and believes that the group as a whole is worthwhile. This is guilt by association.

In many cases—which were rejected by the District Court—this Court has held that government has no power to prohibit or punish mere knowing membership in the Communist Party, if it is not "active." Otherwise, the principle of guilt by association, foreign to our law, would be approved. *Scales v. U.S.*, 367 U.S. 203; *Noto v. U.S.*, 367 U.S. 290; *Yates v. U.S.*, 354 U.S. 298, and *Dennis v. U.S.*, 341 U.S. 494. It is clear that Washington has no power to incorporate the principle of guilt by association

into her employment policies. It surely cannot go beyond inactive, but knowing membership in the Communist Party, if that far, and prohibit absolutely all state employment to those persons who are members of "subversive organizations." Furthermore, this Court has held that the First Amendment grants to every citizen the constitutional right to advocate violent overthrow of government so long as he does not incite others to unlawful action:

> "We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *(Noto v. U.S.*, 367 U.S. 290 at 297, 298).

Yet, it is exactly these, and other constitutional rights to liberty and association, that Washington insists each of its employees must give up as a condition precedent to their qualifying for employment. This Court has held these rights to be immune from the indiscriminate reach of state power.

It is no answer to argue that state employment is a "privilege" and not a "right," and then infer that the infringements here are permissible because they infringe upon no rights. This Court has set that issue at rest, holding:

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." *(Wieman v. Updegraff*, 344 U.S. 183 at 192; expressly

confirmed in *Torcaso v. Watkins*, 367 U.S. 488, 495-96, and in *Cramp v. Florida*, 368 U.S. 278.)

We submit that the unlimited and indiscriminate sweep of the statutes defining the 1955 disclaimer oath bring them within the ban of this Court's prior cases and that the statutes' comprehensive interferences with freedom of speech and association go far beyond what might be justified in the exercise of the state's legitimate conditions of employment for its professors and other employees.

The Unconstitutional Breadth of the 1931 Oath of Undivided Allegiance

The 1931 oath of undivided allegiance to government is likewise a broad intrusion of state power into areas forbidden the state by the First and Fourteenth Amendments. The sweep of this oath is measured by its requirement that every professor must solemnly swear that he "will by precept and example promote":

1. "respect for the flag and"

2. "the institutions of the United States of America and the State of Washington,"

3. "reverence for law and order" and

4. "undivided allegiance to the government of the United States."

This oath is an annual oath applying not only to certification and to every new teaching contract, but also to the renewal of every teaching contract in the State of Washington. Its purpose is clearly that of promoting patriotism, a purpose heretofore held insufficient by this Court

as a justification for abridging freedom of speech, association, and conscience. *West Va. v. Barnette*, 319 U.S. 624. The oath seeks to achieve its goal of patriotism by requiring, among other things, that a professor give up his independence of mind and conscience and swear that he will promote by precept and example undivided allegiance to the government of the United States. Thus, this oath strikes at the very heart of free conscience, speech, and association, and seeks to impose upon all professors a thought-stifling and action-conforming nationalistic orthodoxy contrary to the clear mandate of this Court that:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." (*West Va. v. Barnette*, 319 U.S. 624 at 642, and see *Engel v. Vitale*, 370 U.S. 421 at 425, where this Court denied that government had constitutional power to compose prayers and require supplication to them as part of a governmental program to further all religious beliefs.)

Yet, it is precisely these forbidden areas that the Washington legislature seeks to reach. It seeks to force professors by word (precept) and act (example) to confess their faith in an orthodox nationalism (undivided allegiance to the government of the United States),—all to the abridgement and detriment of the professors' constitutionally protected freedom of religion, conscience, speech and association. Of the unconstitutional invasions

into these areas there can be no doubt. Also, there can be no doubt of the consequences if a professor fails to execute the 1931 oath, because the statute provides that if "any person or persons . . . fail or refuse to execute the oath . . . any contract executed or renewed, or license issued in violation hereof shall be and is hereby declared to be null and void." The statute operates summarily.

Although alleging that it would not do so, the District Court did pass upon the constitutionality of the 1931 statute, at least insofar as it involves freedom of speech, association, and conscience. The District Court held: "Insofar as the arguments heretofore considered with respect to the loyalty oath [the 1955 disclaimer oath] are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable."

We submit that the District Court committed error and that under our constitutional system, the coercion of undivided allegiance to government is unknown. "The idea that loyalty will ultimately be given to a government only so long as it deserves loyalty and that opposition to its abuses is not treason has made our government tolerant of opposition based on differences of opinion that in some parts of the world have kept the hangman busy." (*Cramer v. U.S.*, 325 U.S. 1 at 21.)

The American tradition is eternally hostile toward every form of tyranny over the mind of man. In the realm of reason and conscience (*West Va. v. Barnette, supra*) as well as in the realm of conduct (*Chambers v. Florida*, 309 U.S. 227), the forced extraction of men's beliefs or acts

are incompatible with a free society. Those who equate loyalty with conformity misconceive the American tradition. Under the pressure of such legislative misconceptions, professors, in order to exercise their profession, are, in effect, compelled to hold opinions on academic, political and social matters as they have been prescribed by the Washington State legislature. To uphold this power would go too far. "What matters is the existence of the weapon. Once the sword is placed in the hands of the people in power, then, whatever it says, they will be able to reach and slash at almost any unpopular person who is speaking or writing anything that they consider objectionable criticism of their policies." (Chafee, Z., Freedom of Speech 466 (1941)).

The free exercise of constitutionally protected freedoms of religion, speech, private association and academic freedom of appellants, and others similarly situated, will be substantially interfered with, and materially abridged, by the statutory requirements that appellants, and others similarly situated, execute the oaths as a condition of continued employment. This invasion of protected liberties is an uncontested and admitted fact:

> "Unless defendants are restrained from enforcing provisions of the Statutes which are challenged by this cause, and from insisting on the execution of the required oaths, plaintiffs (appellants), and others similarly situated, will suffer irreparable injury not compensable in monetary damages." (R. 174.)

The undoubted encroachment upon appellants' free exercise of the above liberties is further corroborated by the statements of Professors Holt (R. 195-6), Valentine

(R. 197), Read (R. 200-1), Murphey (R. 204-5), Rader (R. 209), Dietrichson (R. 215), and Wilcox, Dawson, Fleagle, English and Keller (R. 191-3), plus the deposition of Professor Z. W. Birnbaum. Of the infringement upon and deterrence of, protected liberties there can be no question.

Indeed, the Opinion of the Three-Judge District Court clearly proceeds from the assumption that the oaths will invade and deter the otherwise free exercise of appellants' First Amendment freedoms. However, without exploring the breadth of the definitions, the lower court ruled that the interferences were justifiable:

> "... plaintiffs assert that the requirement that they sign the form of oath presented to them, in the language in which it is couched, unjustifiably invades their First Amendment freedoms of speech, belief and association, and will tend to discourage the exercise of constitutionally-protected rights of association and exchange of ideas, ... impairing their performance of their academic function. Such rights, whether in relation to academic liberty or otherwise, are to be accorded a high degree of constitutional protection, but they are not 'absolutes.' It is sometimes necessary to reconcile these constitutional protections against the exercise of valid governmental powers by a 'balancing' of the interests involved.[17]
>
> * * *
>
> "If denial of state employment to a 'subversive' person, as defined in the statute, constitutes any invasion of constitutional rights of speech and association, the restriction certainly goes no further than may be justified, under 'balancing' principles, by the state's interest in self preservation and in the qualifications and fitness of its employees.[23]" (215 F. Supp. 439, at 447, 448.)

Thus, the District Court "balanced" away many of appellants' First Amendment freedoms, including several which are necessary to appellants for "their performance of their academic function." An application of these oaths to appellants, and others similarly situated, means that they will have to give up, absolutely, several of their First Amendment freedoms as a condition of retaining their academic employment.

The Oaths Will Also Effectively Deter Appellants' Free Expression and Conscience

In addition to the consideration of abandonment of constitutional rights, there is the consideration of deterrence of others. Even if appellants were to execute these oaths, which they refuse to do, appellants' rights to free expression and honest conscience would be substantially deterred. The deterrence of appellants' free exercise of their liberties of speech, association, academic freedom and honest conscience, guaranteed by our Constitution, takes on particular significance when one considers the possibilities of a perjury prosecution, or the threat of a perjury prosecution, for falsely executing the oaths. The indiscriminate sweep of the statutory definitions can only add to the deterrence of free expression when they are considered in light of recent social developments in many of our Western states, including the State of Washington.

At one time, perhaps, the threat of prosecutions may have been rare. But, today, our society has witnessed a rising movement in the name of anti-communism. Professional anti-communism is dangerously close to becoming as doctrinaire as communism itself—and may, indeed in some areas it does, embrace the root evil of totalitarianism—

intolerance. (See, Bell, D., (ed), The Radical Right (1963); Sherwin, The Extremists (1963); Ellsworth, R. and Harris, S., The American Right Wing (1962); Suall, I., The American Ultras (1962); First National Directory of Rightist Groups (1962); Gould, G., Inside the Birch Society (1961).) The presence of these groups in our society means that there are now jurymen who might quite likely convict for perjury on the basis of the Washington statutes set forth above.

The State of Washington, too, has a strong component of anti-communists within its boundaries (see, Gottfried, A. and Davidson, S., The New Right in Action, *The Nation*, July 29, 1961, reprinted in Hearings, Subcommittee of the Senate Judiciary Committee to Investigate Attacks on the Internal Security Act, August, 1961). A recent article by Professor Alan F. Westin, entitled "Anti-Communism And The Corporations," 36 Commentary 479 (1963) states, at pages 481-482:

> "What of these 'blue-chip' companies? Have they been urging Birch Society and Christian Church Crusade materials, either for in-plant or outside-the-gate programs? Many unfortunately have.
>
> "For example, Boeing, the 19th largest company in the nation, with 88,000 employees and over one billion dollars in defense contracts, presented Dr. Nicholas Nyaradi to its Supervisors Club in Seattle on October 31, 1961. Billed as a discussion of anti-Communism, the speech featured such remarks as Dr. Nyaradi's view of the twenty-six African nations that joined the U. N. in 1960:
>
> "'When I watched last year the procession of those distinguished trial chieftains and witch-doctors as they paraded down there in UN head-

quarters, with their very fancy headgears and their leopard skin coats and what-not, at the very same time a wild rumour swept the halls of the UN. According to this, it was said that the president of one of those new republics, the Republic of Gabon, five years ago ate up his own mother-in-law. Well, the rumour was neither confirmed nor denied. But as I watched these distinguished witch-doctors, honestly speaking, I couldn't help but believe that the main reason why they came to New York was to study the American food processing industry. They must have been interested in how to prepare instant missionary, or frozen TV explorer dinners, or what-not.' (Quoted in *The American Liberal*, July 1962, p. 7.)

"Boeing reprinted this speech, bristling with similar points about 'first-and-second-generation cannibals,' and distributed it to Boeing management as a worthwhile contribution to education about Communism.

"

"The blue-chip corporate community has also been represented in abundance at another and similar type of seminar—the Freedom Forums held annually by the National Education Program, producers of *Communism on the Map*. In recent years, these have been organized around the central theme of Communism, and offer such stellar lights of the John Birch Society as Tom Anderson, Clarence Manion, and Glenn Green as speakers, along with Eddie Rickenbacker and other assorted rightists. In 1961 and 1962, the following companies, among others, sent executives (many of them the training or public affairs officers at company plants) to soak in this priceless education: Boeing Aircraft, Houston Lighting and Power, Monsanto Chemical, Gulf Oil, Southwestern Bell Telephone, Stockham Valves and Fittings, Pontiac Motor Division, Quaker Oats, and Goodyear Tire and Rubber.

"

"Still another major link between blue-chip cor-

porations and nonsense anti-Communism involves the Christian Anti-Communism Crusade of Dr. Fred Schwarz. . . . The characteristics of the Schwarz movement are: (1) a roster of speakers that includes many radical-right figures who add the specific rightist appeals that Schwarz himself avoids (speakers like W. Cleon Skousen, for example, who demands a housecleaning of the State Department, a break in diplomatic relations with all Communist and neutralist countries, withdrawal from the U.N., etc.); (2) a complete absence of liberal anti-Communists or social-democratic anti-Communists from school platforms; (3) a tendency to allow Birch Society and other radical-right groups to attach themselves to the schools in order to recruit new members from among the audiences.

". . . Schwarz's special luncheons for businessmen, furthermore, have attracted as many as five hundred to six hundred participants at a time in West Coast, Midwestern, and Southern cities. In 1962, such a luncheon in Seattle brought executives from Wigwam Stores, Standard Insurance Co., Boeing Aircraft, National Bank of Commerce, Associated Grocers, and Puget Sound Bridge and Dredge Co. into the hall to support the Schwarz 'crusade' in that city."

Appellants fear that, as of late, the attention of many right-wing extremist groups has been focused more and more upon our colleges and universities. (See, 49 AAUP Bull. 323-327, 336-359 (1963)).

That these are not idle fears is clearly revealed by the course of recent events. Three students at the University of Indiana, members of a student group known as the Young Socialist Alliance, were recently indicted by an Indiana grand jury for having violated that state's anti-communist statute which is worded with extremely similar terms to those in question here. The indictments are reported to charge that the three students assembled "for

the purpose of advocating or teaching the doctrine that Government . . . should be overthrown by force, violence or unlawful means . . ." *The New York Times*, Western Edition, for Friday, May 3, 1963 at page 9 reports as follows:

> "'The important thing in this case,' Mr. Hoadley [Monroe County, Indiana, prosecuting attorney] said, 'is to get this organization off the campus. The University is a department of State Government'."

The above indictments were later dismissed. But, as the following reprinted editorial from the October 12, 1963, issue of the *New York Times* indicates, the defendant students have been reindicted. This means that a different Indiana grand jury must have been so inclined:

"The New York Times."
"October 12, 1963."

"FREEDOM ON THE CAMPUS"

"To say that freedom should be less experimental on the campus than in other areas of American life is to undermine the basic educational idea of a university of scholarship.

"Several current university cases point up a contrast in attitudes on this question. At the University of Alabama in Tuscaloosa a student editor of the campus newspaper, The Crimson-White, has had to sign an oath, as a condition of school attendance, saying that he would 'refrain from gratuitous or nongratuitous service with the news media in matters expressly touching on race relations . . . at the university.' Thus, on the burning issue of the day, the campus editor must be silent, not allowed to report to the outside world what is happening in his own university.

"A similar issue of freedom of expression arises at

Brooklyn and Queens Colleges here in New York. Two of the student leaders of last summer's trip to Cuba have been refused permission to speak before student organizations that had invited them. The college administrations have rationalized their decision by citing the Board of Higher Education's ban against speakers who are under 'judicial consideration.' The fact that these two students have been indicted by a Federal grand jury should not convict them beforehand—and prevent their voices to be heard and opposed on campus.

"At the University of Indiana three students who are officers of the local Young Socialist Allegiance chapter have been reindicted by a county grand jury under a 1951 state law 'to exterminate Communism and Communists and any and all teachings of the same.' An earlier indictment was quashed.

"The university has refused to take any action against the students. President Elvis J. Stahr showed courage and understanding of the university role when he declared: 'We have far too much to lose ultimately if we unleash the forces of suppression under the guise of protecting freedom. . . . Indeed, the wrong kind of hunt for the presumed villain can too easily be more damaging to freedom than the villain himself.'

"That is the difference between freedom and non-freedom on campus."

Since preparing the Pre-Trial Order, but in time to be included in plaintiff-appellants' trial brief, appellants have come upon a document entitled "American Intelligence Service," Vol. I, No. 2, August, 1962, published by Mr. A. F. Canwell, Director, Spokane, Washington, and former chairman of the Un-American Activities Committee of the Washington State Legislature which says of the

American Civil Liberties Union of Washington, to which several appellants belong:

> "The Washington State Chapter is one of the most effective units of the American Civil Liberties Union because it has some of the ablest left-wing lawyers in the country on its board: There are men who are on many of the major Communist fronts, who also are officers on the National American Civil Liberties Union and on the State Civil Liberties Union."

Mr. Canwell concludes Vol. I, No. 2:

> "One cannot overestimate the danger. These agents are everywhere. They are in key positions. They are in the ministry of the churches. *They are in our educational system.* They are in the scientific fields. They are at the highest levels of government." (Emphasis supplied.)
>
> "Only a Knave or a fool would underestimate the danger. It has never been greater."

Professor Melvin Rader, appellant, and twice Chairman of the Washington Civil Liberties Union (R. 209), has been the subject of increasing right-wing attack. The investigation of Professor Rader by the Washington Un-American Activities Committee has been set forth in the Statement of the Case. Although the Washington Un-American Activities Committee Report about him has been proved false, Professor Rader continues to be linked with Communism, subversion and deceit. One recent example occurred on December 14, 1963. On that day, printed on the reverse side of its front page, the *Seattle Times*, the largest Seattle newspaper with over 250,000 circulation, reported the following story involving Professor Rader:

"No Half Ways For Reds, Says Witness"

"OKANOGAN, Dec. 14.—(A.P.)—Barbara Hartle, former Communist, says she does not believe it possible for any person to be in a Communist cell and not be 'totally committed to Communism.'

"The 55-year-old one-time convicted Communist conspirator, who renounced Communism and has testified in several state and federal hearings, will be called back to the stand when trial of the $225,000 Goldmark libel suit goes into its seventh week Monday.

"Mrs. Hartle, now living on a small chicken ranch at Evans, north of Spokane, was questioned by a defense attorney, E. Glenn Harmon, yesterday. In his query about Communist-cell membership, Harmon said he referred to 1934-43, during which Mrs. Goldmark has admitted belonging to a unit at Washington, D. C. She says she later dropped party membership.

"Could any person, the attorney asked, be a member of a Communist cell anywhere and not be 'totally committed' to Communism. After Goldmark attorneys' objections were overruled, Mrs. Hartle replied: 'No, it would not be possible.'

"Mrs. Hartle testified the Communist Party worked for the political defeat of legislator Al Canwell of Spokane, one of the four individual defendants.

"She was asked about the party's feeling about the state legislative un-American activities committee headed by Canwell in 1948. She replied:

"'The attitude . . . was to maintain an all-out campaign for the defeat of the Canwell committee and later of Mr. Canwell, himself.'

"Canwell was defeated for re-election to the Legislature and in campaigns for the United States Senate and House."

"The Goldmarks contend they were libeled by statements and published matter in the 1962 primary election campaign in which he was defeated in his bid for re-election to the legislature.

"Mrs. Hartle was allowed by Superior Judge Theodore S. Turner to testify over the objections of the Goldmarks' counsel. The judge said he thought the 'nature of the Communist Party . . . is relevant because of the nature of the libel charge.'

"Judge Turner said neither side could ask questions which would bring out the names of persons in the Communist Party. However, questions could be asked, he said, where persons had been linked in testimony with the American Civil Liberties Union.

"The defense attorney, Harmon, then asked Mrs. Hartle about Prof. Melvin Rader of the University of Washington. Rader had earlier been identified in testimony as a former president of the Washington chapter of the A. C. L. U.

"Mrs. Hartle testified Rader had been a 'known member of the Communist Party.' She said she had attended a closed Communist Party meeting with Rader and that only party members could attend such sessions. She testified that Rader had been known in Communist Party circles as being 'under party discipline.'

"Notified of her testimony, Rader issued a statement at Seattle in which he vehemently denied Mrs. Hartle's statements. Rader said that as far as he knew he had never met Mrs. Hartle, and added:

"'I have never been a member of the Communist Party. I have never been under Communist Party discipline. I disagree fundamentally now, as I always have in the past, with the theory and practise of Communism.'

"In 1948, at a meeting of the Canwell Committee at Seattle, Rader also denied under oath that he had ever been a member of the Communist Party."

Thus once again, ominous clouds of suspicion, obloquy and subversion have started to gather around the reputation of Professor Rader. His history, since the Un-American Activities Committee Hearings of 1948 shows that this courageous man has been pilloried (R. 212-13) because he takes the dictates of our First Amendment seriously. Were Professor Rader to execute the oaths found on Oath form A, then it is not at all unlikely that he would, wrongfully, be subjected to a perjury trial, or the threat of one. Professor Rader is a professor of social philosophy; can he be expected to execute the oaths and fearlessly continue to explore and lecture on all aspects of Communism, Fascism, Socialism and Democracy?

Indeed, it is likely that the threat of a prosecution for perjury for falsely swearing that he is not a "subversive person" hangs over the head of every person at the University of Washington who would execute the oaths and who would continue to express views to the left of center, or, indeed, who takes seriously, and acts upon, the mandate of our First Amendment. Besides the threat of perjury prosecution, there is the very real threat of dismissal from academic employment. In 1941, at "Western Washington College of Education the president was dismissed after attack by a right-wing group for having allowed radical speakers on the campus, failing to hold patriotic meetings, allowing an 'anti-American' Social Science Club to function, and tolerating a 'subversive' campus newspaper." Emerson & Haber, Academic Freedom Of The Faculty Member As Citizen, 28 Law & Contemporary Problems 525, 536 (1963). The Report is found

in 27 A. A. U. P. Bull 48, and see, Morris, Academic Freedom and Loyalty Oaths, 28 Law & Contemporary Problems 487 (1963).

The threat of prosecution for perjury is not the only way in which the oath statutes deter the exercise of free expression and conscience. There is a consideration separate from that of perjury and separate from the vagueness inherent in the definitional sections of the oath statutes, and which serves only to reinforce the deterrence of free expression. The University of Washington, pursuant to a statutory command of the 1951 Washington Subversives Activities Act, has instituted procedures designed to ascertain whether any professor who executes the disclaimer oath has subsequently become a "subversive person." (See, Ex. 4, "Basic Consideration Involved In Appointment of Faculty" Vol. II, Faculty Handbook, pp. 19-21.) Sec. 12 of Chapter 254, Laws of Washington, 1951 (RCW 9.81.070) provides:

> "Sec. 12. Every person and every board, commission, council, department, court or other agency of the State of Washington . . . who or which appoints or employs or supervises in any manner the appointment or employment of public officials . . . shall establish . . . procedures designed to ascertain whether any person is a subversive person."

The command of this statute is clear. The reason a continuing surveillance of the professorial teaching and research faculty is necessary, even after a professor should execute the oaths, is that a "subversive person" is, by statute, ineligible for public employment. It matters not when a person might become a "subversive person."

whether before or after executing the oath. In either event he is ineligible for University employment:

> "No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (Sec. 11, Chapter 254, Laws of Washington, 1961; RCW 9.81.060.)

The nature and scope of the surveillance procedures that would be involved are adumbrated in the Washington Subversives Activities Act of 1951.

The heavy toll taken by test oaths of University professors has been indicated by Professor Brown of the Yale Law School in Loyalty and Security-Employment Tests in the United States (1958) pp. 120 ff., and, passim. A summary of the tests practiced appears at pp. 130-1. At p. 339, Professor Brown indicates that teachers are especially vulnerable to loyalty and disclaimer oath tests:

> "The fact that most teachers are public employees makes them especially vulnerable to loyalty tests on the grounds advanced with respect to civil servants. (See pp. 333 to 338). On the other hand, this is a field in which no valid security considerations exist, except in special areas of applied military research that are not primarily part of the business of seeking and transmitting knowledge."

Also see pages 333 and 339 to 349 of Professor Brown's book for further discussion regarding loyalty oath tests and their impacts upon teachers.

We agree with Professor Brown that in special areas of applied military research considerations different from

normal academic employment prevail. It may be appropriate in those special areas to subject those who engage in military research to individualized security screenings. However, many appellants, e.g., Professors Halpern, Dash, Eaves, English, Jacobsohn and Geballe (R. 188), and others similarly situated, who do contract research involving access to classified information, already possess security clearances "granted by at least one of the following: The United States Atomic Energy Commission, The United States Air Force, the United States Navy or The Boeing Company" (R. 188). In light of these facts, there can be no reasonable grounds justifying the State legislature's requirement that these appellants, already possessing security clearances, execute Oath form A before they become eligible for academic employment at the University of Washington.

Loyalty oaths deter freedom of expression by having an unhealthy and intimidating impact upon a person's conscience and personality. They contribute to increased anxiety and the disruption of emotional and intellectual integration of individuals, and make for estrangement of the individual from his society. They impinge upon freedom. The Committee on Social Issues of the Group for the Advancement of Psychiatry has studied loyalty oaths, reporting their findings in Considerations Regarding the Loyalty Oath as a Manifestation of Current Social Tension and Anxiety, G.A.P. Symposium, No. 1 (Oct. 1954). This group of psychiatrists state that a loyalty oath

> "... places the individual's loyalty in question, it forces him to defend it, it forces him to deny an im-

plied accusation of treasonable intent toward his government. In its manifest content, the current loyalty oath is threatening and coercive. In its latent content, it generates an atmosphere of accusation and suspicion." (Page 2)

"We are witnessing a perceptible change in the pattern of authority creating conflicts within the individual and between the individual and society. The increasing enforcement of defensive oaths, often demanded yearly, engenders suspicion and anxiety. This anxiety is akin to that experienced by a child who becomes alienated from the authority of his parents by: (1) the lack of trust in him sensed by the child; (2) the increased threat of punishment. In this pattern of relationships, the value of the parent as a model becomes diminished and identification with the parent becomes more difficult.

"The conflict can be readily understood by examining the situation of teachers who, as a group, are particularly hard hit by the negative aspects of the oaths. They are constantly forced to submit to an authority which seemingly does not trust them nor accept them as mature, responsible people. This results in alienation from the authority, self-depreciation, limitation of function and devaluation as models for the next generation. All this engenders hostility in the teacher which he may displace (a) towards his peers by an intensified suspicion of them and by both accusing and provoking accusations from them; (b) towards the student group, which he now might begin to limit as he himself feels limited. Furthermore, he becomes confused by the official sanction of attitudes incompatible with heretofore unquestioned collective ideals which he was accustomed to pass on to his pupils. Here are some of these discrepancies: The conflict is by [no] means limited to the teacher. The government official, the industrial leader, the lawmaker, find themselves in similar positions, being both threatened by and having to impose the coercive and constrictive atmosphere concomitant

with the oath procedure. Patterns of relationships thus established undermine trust in and respect for constructive governmental authority. It has been amply demonstrated that the oath as a detective or deterrent agent has but little value. In fact, it is no security measure at all. The real internal enemy is not frightened nor made to feel guilty by perjury. Furthermore, his identity becomes obscured since an ever increasing number of 'deviant' individuals and groups are drawn into the vortex of suspicion." (Page 2-3)

The above views have been underscored by Dr. Marie Jahoda, a social psyschologist at New York University:

"Let me end by summarizing our study thus: There is a real danger that the loyalty and security measures which are, of course, designed to preserve the security of a democratic and American way of life are —unwittingly perhaps—administered in such a way that they endanger what they are set up to protect." (Considerations Regarding the Loyalty Oath as a Manifestation of Current Social Tension and Anxiety. G.A.P. Symposium, No. 1, Oct. 1954, pp. 11-12.)

It seems to us obvious that the 1931 and 1955 oaths guarantee that there will be a realization of the dangers foreseen by Dr. Jahoda and that they contradict an absolute requirement of academic freedom:

"The *values* of freedom can be supported only by the *methods* of freedom. The very experience of being free in the examination of facts is the only effective way of learning the values of freedom. The attempt to teach democratic values by the undemocratic methods of indoctrination and propaganda is inherently contradictory, for students will quickly sense the inconsistency and suspect their teachers of hypocrisy. They will become bored or cynical if they see that the educational process is cut and dried. This would hardly provide the basis for genuine loyalty to democ-

racy." (Melvin Rader, Teaching About Communism, 64 Teachers College Record 577, 579 (1963).)

This Court appears to have looked ahead to this day when it said that it "would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose." And, realistically, "experience teaches that prosecutors too are human." *Cramp v. Florida*, 368 U.S. 278 at 286-7.

Were a professor prosecuted for perjury, before right-wing jurymen, much of the evidence would, most likely, come from students who sat in his classes. Given the now realistic threat of prosecution for perjury, today's anti-communist attitudes, and the possibility of student testimony against him, what professor can execute the oaths in question here and then courageously proceed openly and fairly to discuss the controversial social issues present in today's society? Could Professor Rader continue to discuss Marxism or Communism or Democracy? It matters little whether the perjury prosecution is successful. The threat of such a prosecution would cast a pall of orthodoxy over the classroom. It is an old and ugly subtlety to strike freedom of the mind in the name of patriotism with the fist of loyalty. Given the threat of prosecution, Professors will fear a continuing surveillance of their teachings and activities, to sift their loyal words from the disloyal. Discussion will end where it should begin; orthodoxy will prevail. There can be no academic freedom in such a situation. "Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the

free intellect." *Adler v. Bd. of Ed.*, 342 U.S. 485 at 510 (dissenting opinion).

Thus, it is not idle when appellants state, in the record of this case, that they fear that if they executed either "Oath Forms A or B that they may subject themselves to harassment and the threat of prosecution for perjury." (R. 188.)

The record in this case amply supports the fears of appellants:

> "What I fear if I sign the oath is that I would have to compromise my conscience and my professional obligation to search for truth and that some member of the class will report my statements about the past improper actions of the United States and that I will be charged with perjury on the grounds that I am a 'subversive person' or that I am violating the oath [of undivided allegiance]. Various super-patriotic societies, like the John Birch Society, collect from students statements made by professors in their classes. I do not believe that I can execute Oath Form A and continue to discuss these matters as I have in the past." (Statement of Professor W. Stull Holt, R. 195-6.)

The record is replete with such realistic statements (R. 198-9); Professor Valentine; (R. 209), Professor Rader; R. 216-217); Professor Dietrichson. These statements have not been impeached and they are in the record. There is nothing in the record to contradict them or to weaken them. They are true.

Nevertheless, the District Court casually dismissed all argument on this point:

> "*It has not been shown that upon subscribing to*

the 'disclaimer' oath plaintiffs will thereby experience any stifling of their freedom of inquiry, criticism and dissent, nor that their academic freedom will be impaired. Without questioning the sincerity of plaintiffs' fears that public hysteria or the temper of the times might conceivably at some future time bring about such a result *we are unable in this declaratory judgment action to find any substantiation for such fears, on the face of the statute, or in the facts of record or within judicial knowledge.* It is our conclusion that Chapter 377, Laws of Washington, 1955, does not constitute a prior restraint on First Amendment freedoms, nor are we constrained to find its language to be vague and uncertain." (Emphasis supplied.)

We submit that the lower court committed error when it made the wrong substantive decision on this point when it assumed the existence of facts not found in the record of this case, and when, in deciding the issue, it ignored facts inescapably found in the record. It is beyond all doubt that an application of the 1931 and 1955 oath statutes to appellants, and others similarly situated, will materially interfere with, and abridge, the exercise of their First Amendment rights to freedom of expression and free conscience.

The 1931 and 1955 Oaths Are Applicable to Citizen and Alien Professors Alike, Requiring Both to Abandon and or Deter Free Expression as a Condition of Employment

It should be noted that the 1955 and 1931 oath statutes apply equally to American citizens and aliens. Appellees do not challenge or question the fact that the 1955 oath applies to citizens and aliens alike, but the state attorney general argues that the 1931 oath applies only to American citizens and not to aliens. It is counsel for appellants

submit that the 1931 oath works a denial of equal protection of the laws against appellants. However, the 1931 oath *does* apply to aliens as well as to citizens. Aliens, too, as a condition of teaching employment at the University of Washington must swear to promote "undivided allegiance to the government of the United States."

The argument of the state attorney general is not a nice one. It is to the effect that the 1931 oath does not apply to aliens because University of Washington officials refuse to follow the express statutory command of the Washington legislature and refuse to administer the oath to alien faculty members. There can be no doubt that the 1931 oath statute, on its face, applies to aliens and citizens:

> "Sec. 2. Every professor, instructor or teacher, who shall be employed hereafter or whose contract may be renewed by any state institution of higher education, or any school supported in whole or in part by public funds, . . . shall before entering upon the discharge of his or her duties subscribe to the oath . . .". (Sec. 2, Ch. 103, Laws of Washington, 1931, see, Appendix A.)

It is true that several University administrations prior to the current one of President Charles E. Odegaard, did not administer to aliens the 1931 statutory oath in its statutory form. What the previous administrations did was to allow an alien to alter the statutory wording of the 1931 oath to suit that alien's conscience and convenience (R. 159), a privilege not afforded to citizens, and then allow the alien professors to execute the altered oaths.

Whatever may have been the past practice at the University of Washington, there can be no doubt that its

current President, Charles E. Odegaard, intends to carry out his duties under the 1931 statute and require that all aliens who are members of the teaching staff execute the 1931 and 1955 oaths. Even if he wished to do otherwise, he could not, because of the publicity given this aspect of this case.

President Odegaard has stated that, "upon advice from the Attorney General of the State of Washington," on May 28, 1962, he made a demand "upon *all* employees of the University of Washington that they execute Oath form A or B, whichever might be applicable to them." (R. 176.) Oath form A carries the 1931 oath and must be executed by the teaching faculty (R. 162).

On June 4, 1962, Provost of the University of Washington, Frederick P. Thieme, informed the University of Washington Deans, Directors and Departmental Chairmen that they should begin their responsibility for obtaining an executed 1931 oath from "*all* persons having teaching responsibilities," that is, "*all* teaching fellows, predoctoral associates, lecturers, instructors, and the professorial ranks." (R. 163.) Vice Provost, Glenn Leggett has stated that the memorandum from Provost Thieme to Deans, Directors, and Departmental Chairmen "instructed the university officials to begin administering Oath form A or B, whichever may be proper in each case, to the personnel employed by the University of Washington." (R. 185.) The chairman of the Department of Philosophy, seeking to carry out his administrative duties, confronted appellant Paul Dietrichson, a citizen of Norway, and demanded that Professor Dietrichson, without modification,

execute the 1931 oath (R. 303-4). Thus, this matter is too clear for further argument. At least since May, 1962, the administration of the University of Washington, on advice of counsel, the Attorney General, has tried to apply the 1931 and the 1955 oaths to aliens as well as to citizens, and this application is the subject of an express stipulation, and the following admitted fact: "... pursuant to a statute, a demand was made by President Odegaard, on May 28, 1962, that *all* members of the teaching staff, *including aliens*, execute the oath Form A here in question." (R. 159.) (Emphasis supplied.)

The lower court erroneously cited only one case: *Poe v. Ullman*, 367 U.S. 497, as justification for its holding that: "The alien plaintiffs may not challenge the constitutional validity of a statute with respect to an application thereof which has never been enforced." The cited case does not control because the facts are not present in the case at bar for *Poe v. Ullman* to be operative. There is absolutely nothing in the record to show that the 1931 oath "has never been enforced" as to aliens. To the contrary, the record is clear that an oath, perhaps a modified 1931 oath, has always been required of all alien-professors at the University of Washington (R. 158-9). Thus, the lower court's holding assumes a state of facts not found in the record, the possible existence of which is expressly contradicted by the record and *Poe v. Ullman* is not operative here. Since some version of the oaths consistently has been required of aliens, then it is clear that they have standing to challenge the oaths under the rule of *Cramp v. Florida*, 368 U.S. 278, and that the District

Court committed error in denying alien appellants this right.

Furthermore, the holding of the District Court necessarily demands that it presently approve an invidiously discriminatory past practice of University officials, which, in operation, amounts to an unconstitutional denial of the equal protection of the laws, thereby abridging the Fourteenth Amendment. This Court has long held that, although a state statute may be fair on its face and impartial in its appearance, yet, if it is applied and administered with an unequal hand to persons in like circumstances, then, it is a denial of equal protection of the laws. The Fourteenth Amendment clearly requires equal operation of the laws upon all persons who are in like circumstances. *Yick Wo v. Hopkins*, 118 U.S. 356; *Soon Hing v. Crowley*, 113 U.S. 703; *Chy Lung v. Freeman*, 92 U.S. 275, and *Maxwell v. Bugbee*, 250 U.S. 525. The unconstitutional past practice of the University administration was that of administering the statutorily-worded 1931 oath unevenly to professors, invidiously discriminating between citizens and aliens (R. 158-9). This practice was relied upon by the District Court as supporting its holding that alien appellants have no standing.

In addition, the past practice discriminated within the alien class itself, in not requiring a uniform oath of all aliens. Thus, even under the strict test of *Goesaert v. Cleary*, 335 U.S. 464, the past practice is unconstitutional, not only because it discriminated between aliens and citizens seeking the same position, but because it discriminated among the class of aliens seeking the same

position, there being no uniform oath applicable alike to all aliens. It works an "irrational discrimination between . . . groups of persons . . ." *Goesaert v. Cleary*, 335 U.S. 464 at 466. Yet, the District Court relied upon the validity of this unconstitutional past practice for support for its ruling. This is clear error, for the lower court's holding rests on an unconstitutional premise, and cannot be allowed to stand. (*Takahashi v. Fish and Game Commission*, 334 U.S. 410 at 420: "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide in any state on an equality of legal privileges with all citizens under non-discriminatory laws.")

C. First Amendment Freedoms of Expression and Conscience May Be Infringed Only to Prevent Some Substantial Evil Which Presents a Clear and Present Danger, or for Some Other Equally Overriding Consideration.

The constitutional rights of appellants which are invoked here are basic to a free society. General legislation of a state which does not touch or concern these fundamental rights will be upheld by this Court if the state legislative body had a "rational basis" for acting. However, where state legislation touches and concerns these First Amendment freedoms a "rational basis" alone will not suffice because "freedoms of speech and of press, of assembly, of worship, may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639.)

This case involves not only the disqualification of otherwise fully qualified professors from the possibility of continued state university employment based on non-advocacy, non-association and non-publication, but also these declarations of non-advocacy, non-association and non-publication are one of the means of implementation, backed up with the potent sanctions of dismissal and perjury prosecutions. Furthermore, the 1931 oath, backed by the same potent sanctions, demands conformity to, and promotion of, "by precept and example" of certain legislatively approved doctrines.

This Court in the past has upheld such provisions, if at all, only where there existed some grave danger or overriding consideration deemed sufficient to warrant an infringement on First Amendment freedoms, such as Congress' attempt to prevent the danger to interstate commerce posed by political strikes (*Am. Comm. Assoc. v. Douds*, 339 U.S. 382) or a city's interest in maintaining the integrity and efficiency of a city's civil service system (*Garner v. Bd. of Pub. Wks.*, 341 U.S. 716). Of a similar nature is *Adler v. Bd. of Ed.*, 342 U.S. 485. However, *Adler* should be sharply distinguished from the case at bar. In *Adler*, this Court passed only on a state's power to create a rebuttable presumption of evidence based on associational activity, when that presumption could be rebutted at a meaningful hearing. In the case at bar, there is no meaningful hearing, and a professor must execute the oaths absolutely to qualify as being eligible for university employment. Nevertheless, *Adler* is somewhat similar in the interest of the state which it presented.

On the other hand, this Court has held that the governmental purposes found in the above cases are insufficient to sustain a state law which crosses over the line of demarcation set by the due process clause and which, as do the oaths in this case, punish the "innocent with the guilty" (*Wieman v. Updegraff*, 344 U.S. 183), or when the breadth of state infringement is too broad:

> "In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved." (*Shelton v. Tucker*, 364 U.S. 479, 488.)

It would appear that this Court has set forth the task of lower courts in such cases as this one, in *Am. Comm. Ass'n v. Douds*, 339 U.S. 382, at p. 399, where it said:

> "When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional partial abridgment of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented."

Thus, the test is one of "balance." (See, Frantz, The First Amendment In The Balance, 71 Yale L.J. 1424.) We think the oaths in this case go well beyond "an indirect, conditional partial abridgment of speech," and that the "balance" must be struck in favor of appellants.

When this Court has balanced the conflicting interests, in no case has it allowed an abridgment of the First Amendment without first satisfying itself, in some particularity, that the nature of the evils perceived by a state

legislature were actually present in sufficient magnitude to warrant the infringement, and no more. The decided cases go no further. The evil is examined, whether it be in the area of political strikes, high school education, or the integrity of a city's civil service, and a necessary infringement, if any, of First Amendment rights may be allowed, *but only to the limited extent absolutely necessary to meet the evil.*

When statutes which deter or prohibit, criminally or otherwise, as is the case here, mere knowing membership in any organization, including membership in the Communist Party, come before this Court, it emphatically requires that they:

> ". . . must be judged *strictissimi juris*, for otherwise there is a danger that one in sympathy with the legitimate aims of such an organization, but not specifially intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of other and unprotected purposes which he does not necessarily share." *Noto v. U. S.*, 367 U.S. 290, 299-300.

When judged by these standards, we believe that the decision below with respect to the constitutionality of the 1955 and 1931 oaths cannot be allowed to stand.

D. The Court Below Upheld Infringements on Free Expression and Conscience Without Any Showing of Nexus or a Subordinating State Interest Which Is Compelling.

The power of the legislature to require oaths from state employees, including university professors, fully as much as the power of legislative investigation (*Sweezy v. New*

Hampshire, 354 U.S. 234, and *Gibson v. Florida*, 372 U.S. 539), must, at some point, be checked by the countervailing command of the First Amendment. This Court has consistently taken the position that state power is subject to such limitations, and it repeatedly has held that a state does not have power to enact any type of oath it could conceivably choose. For example, a state has no power to require oaths, as conditions of employment, which do not carry a requirement of knowledge (*Wieman v. Updegraff*, 344 U.S. 183); nor does it have power to prescribe oaths, which, although requiring knowledge, are, nonetheless, vague and not susceptible of objective measurement (*Cramp v. Florida*, 368 U.S. 278); nor, significantly for this case, does a state have power to require certain statements, made under oath, from teachers which "broadly stifle fundamental personal liberties when the end can be more narrowly achieved," although the knowledge requirement might be present, and although the governmental purpose might be "legitimate and substantial." (*Shelton v. Tucker*, 364 U.S. 479 at 488.) We submit that the Washington legislature in this case has broadly encroached upon fundamental liberties, contrary to the First Amendment's limitation on state power, and that the state's legitimate interest could more narrowly be achieved by using procedures which are already in existence, without recourse to the statutes requiring the two oaths.

It is clear that the Washington legislature has no power under the First and Fourteenth Amendments to require, as a condition of state employment, that all state employees execute oaths that either they are, or are not, Jews, Catholics or Protestants, or execute oaths that either they are,

or are not, members of the Republican or Democratic parties, or execute oaths that either they do, or do not, advocate, abet, advise or teach by any means the desirability of governmental subsidization of contraceptives as a means of population control. Such oaths, as conditions of employment, would obviously contravene the mandate of the First Amendment, even though, like the Washington oaths, they carried the requirement of knowledge. Wherever this Court may draw the line as to the exact point at which the First Amendment does operate as a limitation on state authority, we submit that the legislature of the State of Washington has over-stepped that boundary line in this case.

No one questions the power of a state legislature, subject to overriding federal power, to enact legislation prohibiting acts of violence to overthrow, destroy or alter constitutional forms of government. Furthermore, under *Dennis v. U.S.*, 341 U.S. 494, a state may proscribe the direct advocacy of immediate force or violence for such purposes, whether by individuals or by organizations. The Washington legislature, in 1909, exercised this power and enacted Washington's criminal anarchy and sabotage statutes (RCW 9.05 et seq.), not in issue here. The power of the state extends to these areas, and Washington's criminal anarchy and sabotage statute occupies these areas fully. But, the state clearly has no power, by reason of the First and Fourteenth Amendments, to prohibit, or unduly burden, by way of oath, or by way of defining a crime, academic or political activity, association or discussion which is directed toward political or social change through peaceful, democratic methods. *Stromberg v. California*,

283 U.S. 359; *De Jonge v. Oregon*, 299 U.S. 353; *Taylor v. Mississippi*, 319 U.S. 583; *Terminiello v. Chicago*, 337 U.S. 1; and see *Sweezy v. New Hampshire*, 354 U.S. 234; *NAACP v. Alabama*, 357 U.S. 449; *Speiser v. Randall*, 357 U.S. 513; *Bates v. Little Rock*, 361 U.S. 516; *Shelton v. Tucker*, 364 U.S. 479; *NAACP v. Button*, 371 U.S. 415, and *Gibson v. Florida*, 372 U.S. 539.

Nor does a state have any power to prevent academic discussions of political and social issues, even where those discussions may directly relate to the doctrines of bloody revolution, force and violence. *Dennis v. U.S.*, 341 U.S. 494, at 501-2. This Court has drawn a sharp line between advocacy of forcible overthrow and the incitement of action to that end. *Yates v. U.S.*, 354 U.S. 298. Nor does a state possess constitutional power to prohibit or forbid knowing, but inactive, membership in the American Communist Party. Such membership might be held by one who is foolish, deluded or optimistic, but he cannot be made a criminal because of it. *Scales v. U.S.*, 367 U.S. 203 at 229-30. Counsel submit that a person, other than members of the F.B.I., could also be a member of the Communist Party for purposes of studying it and for the scholarly purpose of obtaining first-hand information about its character and social significance in our society.

Nevertheless, the Washington oaths demand that an affiant, among other things, swear that he is not knowingly a member of "any organization . . . a purpose of which is to . . . teach activities . . . intended to . . . assist in the . . . alteration of the constitutional form of government . . . of any political subdivision of them (U. S. or

State of Washington) by force." (See appellant's Exhibit No. 14, question 530 at page 46.) In essence then, the Washington statute prohibits the mere knowing membership of "A" in the communist party and also in all other organizations which have as one of their purposes the teaching of doctrines or activities to "B" which are intended to assist in the overthrow of the constitutional form of government by force. It catches up the assistant to the assistant. It does not say that mere knowing membership must be accompanied with clear proof that the member himself or the person who is taught, *"by any means,"* actively and "specifically intends to accomplish the aims of the organization by resort to violence." *Scales v. U. S.*, 367 U. S. 203, 229, and see, *Noto v. U. S.*, 367 U. S. 290, 299. The Washington Statute does however, make "A" accountable for the speech and acts of "B." The statute aims at constitutionality protected association.

In *Scales v. United States*, 367 U. S. 203, this Court carefully marked off the boundaries of the First Amendment as it applies to assembly and associational membership. In that case, and pursuant to past decisions, this Court construed the Smith Act's membership section, in such a way as to meet constitutional objections thereto:

> "Thus the member [of the Communist Party of the United States] for whom the organization is a vehicle for the advancement of legitimate aims and policies does not fall within the ban of the statute: he lacks the requisite intent 'to bring about the overthrow of government as speedily as circumstances would permit.' Such a person may be foolish, deluded, or perhaps optimistic, but he is not by this statute made a criminal." (*Scales* at 229-230.)

In *Scales*, this Court said that a statute has met Fifth and First Amendment requirements after it has been,

> "... found to reach only 'active' members having also a guilty knowledge and intent, and which therefore prevents a conviction on what otherwise might be regarded as merely an expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action." (*Scales v. U. S.*, 367 U.S. 203, 228.)

Once this constitutional standard has been met then: "Little remains to be said concerning the claim that the statute infringes First Amendment freedoms [of private association and assembly]."

In short, it is beyond the power of a state to prohibit or punish *all* knowing associations or memberships in an organization, e.g., the Communist Party, or otherwise, which has been shown to engage in the proscribed advocacy. (But see, RCW 9.81.030 making mere membership in a "subversive organization" a felony, and RCW 9.81.083 declaring the communist party to be a "subversive organization.") The State's exercise of power must be more selective. Another element is necessary. There must be a clear indication that each accused member of such an organization specifically and actively intends to accomplish the aims of the organization by resort to violence. Otherwise, freedom of association is too easily abridged, and guilt by association would become part of our law. (*Noto v. United States*, 367 U.S. 290, 299; *Scales v. United States*, 367 U.S. 203, 229.) But, the Washington oath statutes seek to prohibit many associational activities which are constitutionally protected under the above

standards. Such power does not reside in the Washington legislature under the First and Fourteenth Amendments.

The First Amendment limitations on state power to restrict freedom of speech have also been set forth by this Court, and the 1955 and 1931 oaths clearly go beyond them:

> "We held in *Yates*, and we reiterate now, that the mere abstract teaching of Communist theory, including the teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action. There must be some substantial direct or circumstantial evidence of a call to violence now or in the future which is both sufficiently strong and sufficiently persuasive to lend color to the otherwise ambiguous theoretical material regarding Communist party teaching, and to justify the inference that such a call to violence may fairly be imputed to the party as a whole, and not merely some segment of it." (*Noto v. U.S.*, 367 U.S. 290, 297.)

State power to legislate in these areas, including legislative prescription of oaths, with their enormous capacity for restraint and suppression, is excluded because "where the First Amendment applies, it is a denial of all governmental power in our federal system." *Marsh v. Alabama*, 326 U.S. 501 at 511. The State, even as an employer, is still subject to the requirements of the Constitution.

Yet, it is precisely these constitutionally forbidden areas that the Washington legislature seeks to invade when it demands that, as a condition of continued employment, appellants, and others, execute the oaths here at issue.

The District Court, below, displayed a lack of under-

standing as to where the line should properly be drawn, and, in upholding the Washington oath statutes, it upheld the power of a state to penalize all advocacy of the legislatively prohibited doctrines; regardless of their immediacy to violence or their generation of public disorder:

> "As to the alleged prior restraints, it is unnecessary to discuss the arguments based upon plaintiffs' interpretation of the cases of *Scales v. United States*[25] and *Noto v. United States*[26] because such arguments (to the effect that a state may not prohibit an inactive knowing membership in a subversive organization and therefore may not condition public employment on an employee's undertaking to refrain from such an association) assume the premise that a state may not disqualify an individual for public employment on the ground that he engages in certain conduct or association when such conduct or association is not criminally punishable. The premise is unsound. Unreliability,[27] or insubordination,[28] or lack of frankness and candor in answering inquiries[29] may render an individual ineligible for employment without necessarily exposing him to criminal prosecution. Different standards are applicable, and Smith Act cases are not in point." (215 F. Supp. at 450.)

It is evident that the District Court has failed to understand the distinction which this Court has drawn between advocacy which may be penalized—(involving a call to violence)—and advocacy which may not. The District Court also failed to understand the distinction between association which may be penalized (active) and association which may not (inactive but knowing membership). All advocacy and association, particularly in a university setting, are not "actions," nor have they ever been so held by this Court. The constructions of "advocacy" and "association" given by the District Court, below, are not narrow

ones. They seem to draw the line at mere belief, and are in accord with the construction of the statutes given by the Washington State Supreme Court (*Nostrand v. Little*, 58 Wn.(2d) 111, at 130 and *Nostrand v. Balmer*, 53 Wn. (2d) 460; see Statement of the Case). Academic discussion, attempts to persuade, advocacy short of a call to violence, along with inactive but knowing membership, all fall within the ban imposed by the Washington oath statutes upheld by the District Court, and which appellants must forego, under these oaths, as conditions of their continued employment.

As has been shown above, the two oaths seriously infringe upon freedom of thought, conscience, speech, and association. They can be justified, if at all, only if (1) the State of Washington clearly has a subordinating interest which is compelling and only if (2) there exists some nexus between appellants, and others, and the subordinating state interest. Otherwise, the mandate of the First Amendment must prevail. These two elements will be discussed in reverse order to their presentation above.

There Is No Nexus Shown by This Record

This Court recently has clarified the concept of Nexus, saying that "regardless of the label applied, be it 'nexus,' 'foundation,' or whatever, . . . it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition *that the state convincingly show a substantial relation* between the information sought and a subject of overriding and compelling state interest."

Gibson v. Florida, 372 U.S. 539 at 546 (emphasis supplied). This nexus must be shown in order to justify the oaths. *Am. Comm. Assn. v. Douds*, 339 U.S. 382.

To decide the nexus question the District Court must look to the facts in this record to ascertain whether the required nexus has been supplied by the state, defendant-appellees here. Although counsel for appellants urged this course upon the District Court, it held that:

> "*It must be presumed* that legislative findings sufficient to justify the enactment of the 1951 statute were made, and that the 1955 amendment was supported by the same findings. We are therefore unable to accept plaintiffs' argument that there has been no showing of a public danger sufficient to justify the enactment of restrictive legislation." (Emphasis supplied.)

Thus, the District Court sustained the constitutionality of the Washington legislation by way of "presumption." In doing so it not only ignored the mandate of this Court on the Nexus point, but also, the District Court assumed two deviations from the actual facts of this particular case; first it assumed a state of facts which the record does not support, and secondly, it refused to consider facts which are clearly in the record in this case. For example, the District Court refused to consider a carefully worked out agreed fact that appellants do not knowingly use their employment at the University of Washington, through teaching, or in any other way, in attempts to bring about violent or forceful overthrow of government (R. 175). Neither the Attorney General for the State of Washington, nor the Board of Regents of the

University, or its President, possess any information indicating that any appellant, or others similarly situated, is a member of the Communist Party, or is a "subversive person," or that any appellant, or others similarly situated, has influenced anyone else to become a "subversive person" or a member of a "subversive organization." (R. 187-8). In other words, the District Court refused to consider facts which positively show that there is no nexus between appellants and others, at the University of Washington, and subversive activities in the State of Washington.

In addition, the District Court refused to consider other relevant facts. The Washington Committee on Un-American Activities made its report, significant portions of which have been conclusively shown to be false. (R 206-13), at the beginning of the 31st Washington Legislature in January 1949. Meeting in full session immediately thereafter that legislature enacted no legislation on the basis of its committee report.

At the time when that legislative session was beginning, the University of Washington was concluding its separate and immediate action to rid itself of employees, faculty and otherwise, who might have been subversive, as reported by the legislative committee. See, Countryman, *Un-American Activities in the State of Washington*, Ch. VI, "Investigation by the University," pp. 186-285 (1951). As reported by the University President, Raymond B. Allen:

> "On January 22, 1949, the Board of Regents of the University of Washington took final action in six

> tenure cases which for more than six months had been before various faculty and administrative officers and agencies. The action of the Regents consisted of the dismissal, as of February 1, of three professors and the retention of three others on two-year probation subject to the requirement that they sign and file with the President of the University affidavits that they are not now members of the Communist Party." *(Communism and Academic Freedom: The Record of the Tenure Cases at the University of Washington 11 (1949).)*

During the hearings of the legislative committee, only ten members of the University of Washington faculty of 700 full-time members were named, but not proved as being, or having been, members of the Communist Party. Thus, the record is clear that whatever doubtful nexus the frequently false Report of the Joint Legislative Fact-Finding Committee (Washington Un-American Activities Committee) may have provided between the faculty of the University of Washington and subversive activities, that nexus was eliminated by the independent investigations, conducted by the Board of Regents, which terminated in probations or dismissals of six faculty members. It is clear that, on this record, the 31st session of the Washington legislature of 1949 can not demonstrate and "convincingly show a substantial relation between the information sought and a subject of over-riding and compelling state interest." However, as the District Court failed to note, the 1949 session of the legislature enacted no "anti-subversive" legislation.

It was not until 1951, and the thirty-second regular session of the Washington Legislature, that such legisla-

tion was enacted. When the 1951 Legislature convened, Governor Langlie reminded it of the disclosures of the Washington Committee on Un-American Activities. In his message he made references to the Committee's Report, but he made no references to the University of Washington. He advised that "in light of the grave emergency which we now face, additional action must be taken immediately . . .". (Message of Arthur B. Langlie, Governor of Washington, to the Thirty-Second Legislature, January 10, 1951.) The 1951 legislative session enacted the comprehensive Washington Subversive Activities Act.

But, it was in 1955, six years after the Committee Report, that the 34th Washington Legislature, without holding any hearings, enacted the 1955 oath requirement challenged in this case. Thus, by no stretch of the imagination, can the needed nexus between the 1955 Act and "subversive activities" at the University of Washington be satisfied by the investigations of the Washington Committee on Un-American Activities during 1948, reporting in 1949.

There is no evidence in the record of any danger caused by any of the appellants, or others similarly situated, to any legitimate interest of the state which would justify the wholesale infringement, necessarily inherent in the 1955 statute, upon free expression. It is the task of the state to produce this evidence, because, as this Court has ruled, it is for "*the state convincingly* [to] *show a substantial relation* between the information sought and a subject of overriding and compelling state interest."

Gibson v. Florida, 372 U.S. 539 at 546 (emphasis supplied).

The above discussion of nexus and the burden of proof with respect thereto, has been directed toward the 1955 oath requirement. However, it is also applicable to the 1931 oath statute. There is no evidence in the record, and none has been sought to be introduced, which, in any way, would provide a nexus or a justification for the infringements upon free expression and conscience made by the 1931 statute. This statute, therefore, is unconstitutional.

We submit that the District Court not only failed to follow the mandate of this Court and thereby committed error when it made the wrong substantive decision on the nexus question, but also that it committed error in not examining the past history; that its decision on the nexus point assumed the existence of facts not found in this record and that its decision on this point ignored facts found in this record. In short, the District Court decided the nexus question presented by this case, without confronting, or exploring, the issues involved in it, although they had been fully briefed and argued. The District Court should be reversed.

There Is No Showing of an Interest of the State Which Is Overriding and Compelling

Even if there were no problems of nexus presented by this case, a constitutional problem would remain. Where state statutes seriously infringe upon freedom of expression, as in this case, then that infringement can be justified, if at all, only when the state clearly shows a substantial

interest which must be overriding and compelling. If such interest is insubstantial, or non-existent, or not compelling, then, it clearly cannot outweigh or prevail against the protection afforded by the First and Fourteenth Amendments. *American Communications Association v. Douds*, 339 U.S. 382; *Sweezy v. New Hampshire*, 354 U.S. 234, and *Gibson v. Florida*, 372 U.S. 539.

In this case, the 1931 oath statute is designed to promote undivided allegiance to government; and it requires that every university faculty member exhibit such fidelity "by precept and example." The 1955 oath statute likewise seeks to promote loyalty and was characterized as a "loyalty oath" statute by the District Court. The objective of both oaths is to encourage loyalty to state and national institutions, and to provide an incentive for the defense of our country. In short, it is the purpose of the oaths to protect the state against "subversive" infiltration:

> "A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching." *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 482.

But, the state here seeks to achieve its purpose by requiring professors to achieve a certain attitude and a certain prescribed state of mind. The oaths operate to discourage or suppress the utterance of certain prohibited doctrines and certain associations, not because the doctrines are dangerous, but because they have been outlawed by the Washington Legislature. Thus, this case raises a constitutional issue expressly left unresolved by this court in *American Communications v. Douds*, 339 U.S.

382 at 396, where this Court said:

> "Government's interest here is not in presenting the dissemination of Communist doctrine or the holding of particular beliefs because it is feared that unlawful action will result therefrom if free speech is practiced . . . Section 9(h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and beliefs."

It is too clear for argument that the two Washington statutes are not designed simply to identify persons, but rather, they have been designed to outlaw certain doctrines and to rid state employment of those, otherwise fully qualified, people who refuse to execute the oaths. The statutes in question here do not allow, for example, a state employee the opportunity to say that he is "a subversive person," and thereby be identified. They require that, if anyone is to qualify for state employment, only one answer can be given: that he is not a "subversive person," or a member of a "subversive organization," and, in the case of a professor, that he will promote "undivided allegiance to government" by "precept" and "example." Thus, only members of this statutorily defined class are eligible to serve as professors at the University of Washington. Everyone else is automatically excluded from any possibility of state employment, an exclusion based on criteria, constitutionally forbidden to the state, of belief, speech and association.

Thus framed, the constitutional issue narrows itself to whether the State of Washington can properly prohibit,

as a condition of continued employment, freedom of speech, expression and association of professors, and other employees, at the University of Washington in the interest of the state in promoting what the legislature believes to be right thinking and correct attitudes on the part of its state employees, including professors. It should be clear that at least this much is necessarily involved in this case. If a state actually has this power, it becomes a monitor of thought, as it determines for its employees what is and what is not right thinking, and, in this case, the State Legislature becomes the monitor of thought and right thinking for every faculty member at a great educational institution, the University of Washington.

When it balanced the interests in this case—the interests that a professor has in academic freedom and freedom of speech, association and expression against the interests that the state has in protecting itself from its employees uttering the prohibited doctrines and engaging in the prohibited associations—the District Court ignored the balancing done by this Court in its most relevant case. *Sweezy v. New Hampshire*, 354 U.S. 234, presented this Court with statutes of New Hampshire worded identically with those defining the 1955 oath in question here; and pitting (1) the interests of a guest faculty member of the University of New Hampshire in academic freedom versus (2) the interests of a state in protecting itself from subversion. The plurality opinion of four justices, not followed by the District Court, declared:

"We do not now conceive of any circumstance

wherein a state interest would justify infringement of rights in these fields." Id. at 251.

The concurring opinion of two justices—also not followed by the District Court—held:

> "In the political realm, as in the academic, thought and action are presumptively immune from inquisition by political authority . . . To be sure, this is a conclusion based on a judicial judgment in balancing two contending principles—the right of a citizen to political privacy as protected by the Fourteenth Amendment, and the right of the State to self-protection." Id. at 266-267.

Thus, the joint decision of six justices in *Sweezy* balanced the interests presented in this case in favor of a professor's constitutional rights to intellectual academic freedom. Although counsel urged this view, the District Court refused to follow the *Sweezy* case.

The lower court also refused to follow this Court's pronouncement in *Barenblatt v. U.S.*, 360 U.S. 109 at 112, that academic freedom is an area of special concern:

> "When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain."

It is evident that the District Court, below, has failed to understand the very essence of the "balancing" test as it has been announced by this Court. In a series of cases (e.g., *Bates v. Little Rock*, 361 U.S. 516; *NAACP v. Alabama*, 357 U.S. 449; *Louisiana v. NAACP*, 366 U.S. 293; *Am. Comm. Ass'n v. Douds*, 339 U.S 382; and *Communist Party v. Subversive Activities Control Bd.*, 367 U.S.

1), this Court has set forth its view that the "balancing" test requires that a court consider a series of factors which enter upon either side of the scales, at least the following factors enter into the "balance":

1. A careful and exact definition of the nature of the legislative interest in requiring employees, faculty members and others, at the University of Washington, to execute the 1955 and 1931 oaths. This governmental interest is defined by considering at least:

A. The various laws already on the books and which deal with the subject area of subversion so as to help isolate the state's specific interest in the oath statutes, i.e.:

(1) RCW 9.81.020 making certain broadly defined "subversive activities" a felony, including a conspiracy to advocate "by any means" any act which may constitute a clear and present danger to government;

(2) RCW 9.81.030 making membership in a "subversive organization" a felony;

(3) RCW 9.81.040 disqualifying from voting, or from holding any public office, anyone who is convicted or pleads guilty under the two above statutes;

(4) RCW 9.05.010 making criminal anarchy and/or its advocacy a felony;

(5) RCW 9.05.020 making the advising or teaching, printing or circulating, or helping to organize an assembly which spreads the propriety of the doctrines of criminal anarchy a felony;

(6) RCW 9.05.030 punishing as felony every person

who voluntarily is present at an assembly where the doctrines of criminal advocacy are taught or advocated;

(7) RCW 9.05.040 making it a felony for any caretaker, janitor, agent or owner wilfully and knowingly to permit an assembly for the purpose of "advocating or teaching the doctrines of criminal anarchy" to take place on premises within his control;

(8) RCW 9.81.050 dissolving and disposing of the property of any "subversive organization";

(9) RCW 9.05.060 making any act of sabotage a felony;

(10) RCW 9.05.080 making the advocacy of sabotage a felony;

(11) RCW 9.05.100 and RCW 9.05.120 making it a felony to display emblems of seditious or anarchistic groups;

(12) RCW 9.05.150 making it a crime to publish matter "having a tendency" to incite to a breach of the peace.

The area of thinking, believing, and/or talking, publishing or urging "subversion" has been covered and recovered so many times over that the statutes of the Washington legislature are redundant to the point of hysteria. There are many, many subsequent punishments. There is no area left for the 1931 and 1955 oath statutes to occupy, other than that of being an unconstitutional prior restraint on freedom of expression, and another invasion of it.

B. The economic, political and social conditions at the University of Washington and within the State, at the

time, so far as they pertain to the issue of whether there was any danger or threat of subversion necessitating these oath statutes. This judgment would rest upon considerations, *inter alia*, whether

(1) There is significant opposition to the major political parties in the State (the Record shows none);

(2) There is military or other armed support in the State for a radical movement proposing to use force and violence (the Record shows none);

(3) There has been a past history of force and violence by the faculty at the University of Washington (the Record shows none);

(4) The Communist Party has been growing in strength in the State, or at the University, and whether it has obtained a position of leadership within the State's churches, industries, local governments, labor unions, and educational institutions (the Record is barren of such proof).

2. On the other hand, under the "balancing" tests, there must be an equally careful and exact definition of the nature of appellants' interest in free expression and conscience, and the interest of society in freedom of expression and conscience at a state university. This interest would require at least a consideration of:

A. The interest of the individual in his rights to expression and free conscience; (R. 189-218, 46-82, 21-2, 26-31).

B. The interest of the individual in his right to silence; (R. 189-218).

C. The nature of the interest of society in freedom of political expression.

D. The nature of the interest of society in free universities (R. 297-8, 299-300, 283-94, 176-84, 32-34).

3. Finally, there should be a careful and discriminating analysis of the ways in which the 1931 and 1955 oath statutes would deter or infinge upon the interests considered immediately above in 2.

It should be emphasized that the District Court, below, struck a balance against academic freedom and the First Amendment interests of appellants without anything in the record showing that, when it enacted the 1955 statute, the Washington legislature had before it, in any way, the exhibits which the state attorney general has offered this Court. Perhaps, these exhibits, of 1949 vintage, were before the legislature in 1951 when it enacted the Washington Subversive Activities Act. But, the Act in question here was enacted in 1955. There is absolutely *NO* showing that, between 1951 and 1955, there was any reason for the Washington legislature to reconsider its 1951 Subversive Activities enactment as being inadequate to meet the problems it believed it faced in 1951; and further, there is *NO* evidence showing that:

(1) The Washington legislature, subsequent to 1951, conducted any inquiry at the University of Washington; or

(2) The Washington legislature had any reason to believe that any of the employees of the University of Washington, or appellants here, between 1951 and 1955,

or at any other time, presented a dangerous threat to the State which would justify further abridging the First Amendment. (The reverse is, of course, true); or

(3) The students, ex-students or professors have been charged, or in any way involved in, any proceedings, administrative or judicial, under the 1951 Subversive Activities Act.

There is no showing in this record currently suggesting the existance of any danger to a legitimate interest of the State of Washington occasioned by appellants, and others similarly situated, at the University of Washington. On the contrary, the record contains many statements that appellants are honorable men who, in no way, use their positions to advocate the violent overthrow of government. Furthermore, the record at pages 187-8, and agreed fact 26 (R. 175), evidences that during the last seven years while the 1955 oath has been enjoined, and while the 1931 oath has not been enforced, there has been no danger of overthrow by revolution, force or violence to the State of Washington all as a result of the teachings and other activities, of appellants, and others similarly situated. During these seven injunctive years, as the record shows, no student or ex-student or faculty member has been charged in any way in any judicial proceeding with being a "subversive person," or a member of a "subversive organization" or "foreign subversive organization." Thus, it would appear that the 1931 and 1955 oaths are useless, trapping only men of conscience, witness appellants here.

The record reveals that, according to University Presi-

dent, Charles E. Odegaard, "the existing recruitment and personnel procedures practiced by the University of Washington during the past seven years, and as improved from time to time during that period, [without the 1931 and 1955 oaths] are adequate to protect the legitimate public interest in securing qualified and trustworthy personnel." (R. 178-9). These procedures contain screening mechanisms, required by University rules and regulations which show that the personnel practices at the University of Washington are adequate to protect the legitimate public interest. (R. 305-17, 279-83).

In short, the record is utterly barren of any evidence which illustrates that, between 1950 and 1955, the teaching and research staff at the University of Washington, or any other employee, does, or has, in any way, presented a clear and present danger, or any danger, to any interest of the State which could serve as justification for the wholesale invasion of First Amendment rights presented by this case.

The above considerations, inadequately explored here, all weigh in the "balance" in this case. Although the District Court, below, accepted the "balancing" test (215 F. Supp. at 447), its opinion nowhere reveals the factors, if any, that it weighed when it struck the balance against appellants, and academic freedom, in this case. We think that the lack of a careful appraisal of the relevant factors and the interests at stake, so necessary under the "balancing" test, and which were urged by counsel below, demonstrates that the District Court grossly misunderstands and misapplied the balancing test, reaching the

wrong conclusion in this case. It should be reversed. We think the correct "balancing" of these oaths is found in the following views of Mr. Justices Frankfurter and Douglas:

> "... Since the affiliation which thus be forsworn may well have been for reasons or for purposes as innocent as membership in a club of one of the established political parties, to require such an oath, on pain of a teacher's loss of his position in case of refusal to take the oath, penalizes a teacher for exercising a right of association peculiarly characteristic of our people. See Arthur M. Schlesinger, Sr., Biography of a Nation of Joiners, 50 Am. Hist. Rev. 1 (1944), reprinted in Schlesinger, Paths To The Present, 23. Such joining is an exercise of the rights of free speech and free inquiry. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers." (*Wieman v. Updegraff*, 344 U.S. 183, 194 (concurring opinion)).

What Mr. Justice Douglas said in *Adler v. Board of Education*, 342 U.S. 485 at pp. 508, 509, 510 bears repeating here:

". . . Fearing condemnation (the teacher) will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled."

". . . Supineness and dogmatism take the place of inquiry. A 'party line'—as dangerous as the 'party line' of the Communists—lays hold. It is the 'party line' of the orthodox view, of conventional thought, of the accepted approach. A problem can no longer be pursued with impunity to its edges. Fear stalks the classroom. The teacher is no longer a stimulant to adventurous thinking, she becomes instead a pipeline for safe and sound information. A deadening dogma takes the place of free inquiry. Instruction tends to become sterile, pursuit of knowledge is discouraged, discussion often leaves off where it should begin."

In sum, these views set forth the basic reasons why the instant oath statutes are at war with First and Fourteenth Amendment guarantees of academic freedom and freedom of expression and conscience.

The action of the Washington legislature in enacting the test oaths in question here indiscriminately dealt with the loyalty of all state employees generally, including that of University of Washington faculty members. Its action gravely affects freedom of speech and association throughout the academic community at the University of Washington and, indeed, throughout the State. Discussions of Communism, Leninism, Marxism, in all their many variants and shadings, now become suspect, whatever their merits or demerits. The same is true of all associations with heterodox organizations or with Soviet or Chinese professors, scientists or educators. These countries and their governing ideas represent some of the most

significant intellectual force of our time. Americans must strive to study and understand them. Yet, it is impossible to study a set of doctrines without associating and being in intercourse with those persons who believe in their validity, whether they be social or scientific doctrines. Thus, if these oaths are upheld, then academic freedom at the University of Washington, in the proscribed areas, will atrophy because test oaths contradict the professorial calling. If these oaths be upheld, then the whole purpose of the First Amendment is defeated.

If a balance must be struck, then it must be in favor of preserving First Amendment rights of appellants. The value the State of Washington receives by way of protecting itself from violent and forceful overthrow of government when it seek to apply these test oaths to University of Washington teaching and research staff seems small indeed when compared with the social costs involved. On the other hand, the value of a vigorously functioning University to the State of Washington and to our Nation, appears great indeed.

We submit the District Court committed error when, without any facts in record in this case to demonstrate the state's need to infringe upon liberty at the University of Washington, it held that the interests of the State of Washington in self-preservation justified imposing these thought- and action-conforming oaths upon appellant-professors, and other employees. Clearly, truth rings loudly in the words of J. B. Bury, particularly when his words are applied to the professorial appellants in this case:

"A long time was needed to arrive at the conclu-

sion that the coercion of opinion is a mistake, and only part of the world is yet convinced. That conclusion, so far as I can judge, is the most important ever reached by men." (J. B. Bury, A History of Freedom of Thought (1913).

The Balancing Test Should Be Abandoned

We respectfully submit that the underlying concept of a "balance" of interests is fallacious, partly because there is no room in the First Amendment for such balancing, partly because even if balancing were appropriate the scales are unduly weighted if one considers the issue to be one of public versus private interest.

We recognize, of course, that these views have been rejected by the Court, though eloquently addressed by its own members in dissent (see particularly Mr. Justice Black, 360 U. S. 140-145). But just as this Court has, from time to time, overruled earlier decisions upon later reconsideration (see, notably, *Minersville School Dist. v. Gobitis*, 310 U. S. 586, overruled by *West Virginia State Bd. of Educ. v. Barnette*, 319 U. S. 624; and *Wolf v. Colorado*, 338 U. S. 25, overruled by *Mapp v. Ohio*, 367 U. S. 643); so we submit that it should now reconsider *American Comm. Ass'n. v. Douds*, and cases resting on it, and overrule them.

At the outset we wish to make it clear that the position we are urging upon the Court involves no dogmatic assertion of absolutes. Situations can be envisioned in which unrestricted freedom of expression might result in the denial of another basic right guaranteed by the constitution, such as the right to a fair trial. (See *e.g.* the considerations mentioned by Mr. Justice Frankfurter in *Mary-*

land v. Baltimore Radio Show, 338 U. S. 912, at 919, 920, and *cf. Bridges v. California*, 314 U.S. 252; *Pennekamp v. Florida*, 328 U. S. 331, and *Craig v. Harney*, 331 U. S. 367).

While the distinction may appear a semantic one, the proper approach, as developed at length by Frantz in The First Amendment in the Balance, 71 Yale Law Journal 1424-50, is not one of "balancing," but one of definition. In other words, the basic question posed in the context of the case at bar is whether the First Amendment protects a person's right to be silent with regard to certain kinds of speech and affiliations and, if so, then to what extent. In defining the extent of such protection the courts must, of course, consider the consequences of any rule. And, as Mr. Frantz points out in briefly mentioning this problem (*op cit.* a 1434), that process can be described as "balancing." But he persuasively demonstrates the dangers that lie in such approach.

In any case, regardless of the language used to describe the judicial process involved, it is a fundamental error to suppose that what is involved is a consideration of private versus public interests. Merely posing the problem in such terms almost produces the answer. The First Amendment does not exist to protect private interests, but to enshrine the most basic element of a democracy, namely, the importance to the community of the fullest and freest discussion of public issues, discussion which, of course, is impossible without free association, even, as this Court recognized in *Talley v. California*, 362 U. S. 60, without a measure of anonymity. Indeed, the majority of the Court

there in effect rejected the "private v. public" interest consideration which was relied on by the dissenting justices (362 U. S. at 69).

In the light of the foregoing, this Court should consider whether, in an academic context, the right to remain silent about affiliations, political, religious, or otherwise, is protected by the First Amendment at all? That the answer must be affirmative cannot be doubted in the light of this Court's various decisions. (See particularly *Bates v. Little Rock*, 361 U. S. 516, at 523; *Sweezy v. New Hampshire*, 354 U. S. 234; *Shelton v. Tucker*, 364 U. S. 479, and *West Virginia v. Barnette*, 319 U. S. 624).

This does not imply that the right is protected against inquiry by all government agents. Here there is, we submit, reason for consideration of the objectives of such agencies. For instance, an answer can be compelled in a law suit where it is deemed relevant to an issue which must be decided to the detriment of one of the parties. For there the public interest in the fair administration of justice is superior to the public interest in free association and the accompanying right not to disclose, leaving the witness to such protection as the privilege against self-incrimination might give in an appropriate case.

However, in a case such as the one at bar, where admitted invasions of the First Amendment occur, it cannot be said that the public interest in obtaining test oaths from University faculty members, and others, is so great as to outweigh the public interest in untrammeled free academic inquiry, speech and association. Yet, by using the "balancing" test, the lower court was able to balance away

the rights of professor-appellants without giving adequate weight to the public interest in free universities. We submit that the balancing test should be abandoned, at least in the area of academic freedom.

E. The District Court Upheld Indiscriminate Infringements Upon Free Expression and Conscience When the Legitimate State Interest Can Be More Narrowly Achieved By Less Drastic Means; Thus, the Lower Court Upheld an Unconstitutional Previous Restraint.

Counsel believe that the doctrine against prior restraints is easily and properly applicable to this case. It does not require this Court to engage in the same degree of balancing as does the "balancing" test, discussed above. The issue in this case, under the doctrine against prior restraints, is not whether the substantive First Amendment areas might be infringed upon by state action, but rather, whether a state might do so by using the particular *method* it has chosen—in this case by means of test oaths.

In a recent case, *Shelton v. Tucker*, 364 U.S. 479 (1960), this Court had occasion to apply the doctrine of prior restraint, holding unconstitutional an Arkansas statute which invaded academic freedom and freedom of assembly and association. An Arkansas statute sought its justification, in the "right of a state to investigate the competence and fitness of those whom it hires to teach in its schools . . ." *id.* at 485. This interest was held too insubstantial to justify the broad invasion of First Amendment rights.

That case, like the one at bar, was tried before a three-judge federal court wherein plaintiffs in *Shelton v. Tucker*, as did appellants here, asked that the District Court de-

clare their rights under the Declaratory Judgments Act and that the District Court issue a permanent injunction perpetually enjoining the Arkansas statute. This Court granted this relief, holding that the Arkansas statute was a prior restraint on the freedom of intellectual liberty, speech and association. The Arkansas statute cast its net too broadly and indiscriminately:

> "In a series of decisions, this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, at 488.

In *Speiser v. Randall*, 357 U.S. 513, this Court, citing cases in which the doctrine of prior restraint had been applied (*id.* at 520 and 521), held unconstitutional a California statute which allowed a *privilege* of an additional property-tax exemption to World War II veterans, on the condition that they would take this oath:

> "I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign government against the United States in event of hostilities." *id.* at 515.

This oath in no way makes such sweeping infringements on freedom of expression as do the two Washington oaths at bar; they catch up an assistant to an assistant, or prescribe undivided allegiance.

In *Speiser*, the state offered the privilege of an additional tax exemption on the condition that the applicant execute the oath; whereas, in the case at bar, the State of

Washington offers state employment, on the condition that the applicant execute oath forms A or B. It cannot be gainsaid that, in both cases, and in *Shelton v. Tucker, supra,* the oaths in question deal with intricate and complex webbing of the freedoms which make up the First Amendment: free speech, assembly and association. In such instances, then, the constitution requires that "the *operation* and *effect* of the *method* by which speech is sought to be *restrained* must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *id.* at 520, citing prior restraint cases. The question is whether a fair method had been established. When deciding this issue

> "The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker,* 364 U.S. 479, 488.

As demonstrated by the record in this case, there are at least two alternative, and individually selective, procedures for identifying "subversives" and eliminating them from state employment at the University of Washington. These procedures are less drastic than the oaths. These two procedures are currently in force and have the same purpose as do the oath requirements questioned in this case.

The first technique has been set forth by the Washington legislature when it enacted Washington's Subversive Activities Act, Section 12, Chapter 254, Laws of Washington, 1951, providing:

> "Every person and every board, commission, council, department, court or other agency of the State

> of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury."

This statutory provision, in force today, allows the University of Washington to use a selective approach to the problem of "subversive employees" and does not have within it the vice of a wholesale infringement on First Amendment rights implicit in the use of the two oaths. This section, considered alone, functions as a means of identification and not as a necessary technique of exclusion, and, in this way, too, it is less drastic.

The second more selective and, hence, less drastic, alternative to the problem of subversives is found in the Administrative Code of the University of Washington. It dates prior to the 1951 legislative enactment cited above. The Faculty Appointment Policy clearly establishes the fact that "subversive" persons are ineligible for appointments. Volume II of the Faculty Handbook, Chapter I, pages 19 and 20, set forth the Basic Considerations Involved in Appointments of Faculty at the University of Washington (R. 310-11):

> "The University should avoid harboring within its faculty any who are dedicated to the destruction of

our liberties and our free institutions, upon which universities depend for their effective functioning. (*id.* at 19.)

> "The Subversive Activities Act of 1951 . . . imposes a restriction upon the power of the regents to appoint or retain as a member of the university staff any subversive person . . . But, even prior to the legislative enactment of 1951, the regents, exercising the discretion vested in them by statute, had taken the position that active members of the communist party are disqualified to serve upon the University Faculty. This policy in effect anticipated the requirements of the state Subversive Activities Act." (*id.* at 20).

University President Charles E. Odegaard has stated that the existing recruitment procedures are adequate to protect the public intetrest (R 178-9). They have been improved from time to time and, during the time these oaths were not administered, because of the injunction in the prior litigation, lasting from 1955 to 1962, no "subversives" have become state employees at the University of Washington (R. 187-8). In addition, many appellants, and others similarly situated, have security clearances for top level governmental research (R. 78- 188).

The University of Washington is circumspect indeed when dealing with communists and the possibility of communism. It has adopted a policy governing guest speakers at public meetings, open only to the students and faculty. That policy not only prohibits all members of the communist party from speaking at an open meeting on campus, but it also "exclude[s] from the campus . . . speakers who are representatives of, or spokesmen for, the Communist Party." (Report of University Pres-

ident, Charles E. Odegaard to the Faculty Senate of the University of Washington, April 12, 1962.) It is inconceivable that a university administration that has gone to such great lengths as that of the University of Washington, disallowing "representatives of, or spokesmen for, the Communist Party" from appearing as guest speakers at a public meeting held on its campus, would then turn around and hire as faculty members "representatives of, and spokesmen for, the Communist Party." Such a possibility is beyond the pale of reason, and cannot seriously be considered (R. 307-17).

A third device (R. 80-1), exclusive of the above two, and exclusive of the 1931 and 1955 oath statutes, used to rid the University of Washington of "subversive professors" is the tenure code, and tenure hearings, at the University of Washington. The nature of tenure hearings with regard to the area of subversion, provided for, and used, before the enactment of the 1951 Subversive Activities Act, is demnostrated by a University of Washington official publication: *Communism and Academic Freedom*: The Record of the Tenure Cases at the University of Washington including the Findings of the Committee on Tenure and Academic Freedom and the President's Recommendations. (Univ. of Washington Press, 1949). Part III—The Anlysis made by the President of the University of Washington—is particularly relevant. It demonstrates that a state's legitimate interest in being protected from "subveresive" professors is safely guarded indeed.

"THE PRESIDENT'S ANALYSIS

"Section I

"Introduction

"In transmitting the report of the faculty Committee on Tenure and Academic Freedom I am confident that a full and fair hearing on the charges has been given. I would go further and say that the Committee had obviously extended itself to afford the respondents an opportunity to present every word and fact in their behalf which might be at all pertinent to a fair adjudication of the issues and charges involved. I should report also that the Administration aided the respondents in a material way by paying the travel expenses of, and fees to, expert witnesses called by the respondents.

"The hearings themselves were conducted in thirty-three sessions during the period from October 27 to December 15, 1946. More than sixty witnesses were heard for the Administration and respondents. Some 3,000 pages of testimony were taken at the hearings and are available in transcript. One hundred and twenty-five exhibits were introduced in evidence and are transmitted with the transcript of testimony.

"I invite your specific attention to the introductory statement of the Committee's report, pages 23 to 29, and especially to pages 27 and 28. There it is noted that the majority of the Committee finds (p. 29) that the Tenure Code does not authorize dismissal for any cause not listed in Section IV. The Administration, the complainant, contended that the listing of causes for removal, Section IV of the Administrative Code, is merely illustrative and not definitive of the meaning to be given to the term, "good behavior." The Committee states (p. 27):

"'It is strongly urged that the Committee is free to recommend dismissal on any one or more of a number of grounds not specifically listed in Section

IV, which would in the opinion of the Committee render the particular respondent unfit to remain on the faculty. The respondents, however, contended that the causes listed in Section IV are definitive and all-inclusive. A majority of the Committee is of the opinion that the latter is the correct interpretation of the Code in this respect. Three members of the Committee, Professors Benson, Goodspeed and Williams, do not concur in this finding. Their views are set forth in separate and dissenting statement in the cases of respondents Butterworth and Phillips (pp. 49-52 for Professors Benson and Goodspeed and pp. 53-54 for Professor Williams).

"I am certain that these differing opinions represent honest differences of judgment on the meaning of Section IV of the Administrative Code.

"Concerning the Administrative Code

"The Board of Regents will recall that, when the present Administrative Code was adopted by the Faculty and approved by the Administration in 1947, it was expressly stated, and so published in the *Faculty Handbook*, that:

"'The government of the University of Washington, the powers and duties of the Board of Regents, and the constitution and authority of the faculty are ordained by the following laws . . .'

"Quoted on pages 27-29 of the *Handbook* are the several acts of the legislature, specifying the powers and duties of the Board of Regents. I shall not quote the statutes in detail but refer specifically to the first paragraph, Section 4557, Remington's Revised Statutes, reading as follows:

"'The said Board shall have full control of the University and its property of various kinds, and shall employ the President, members of the faculty, assistants and employees of the institution, who shall hold their positions during the pleasure of said Board of Regents.'

"On page 30 of the *Handbook*, following recitation of the applicable laws, this statement appears under the heading, 'University Administrative Code':

"'Subject to the foregoing laws, the following code has been adopted by the faculty and approved by the President for the administration of the University.'

"Chapter No. IV of this Code, entitled 'Tenure and Academic Freedom,' deals with the matter under discussion. The Committee on Tenure and Academic Freedom is created by Part II of this chapter. The language upon which the Committee is divided appears in Section IV of Part I of this chapter which lists the reasons for removal from the faculty for cause.

"I respectfuully invite your attention to the fact that the Board of Regents never at any time specifically approved or ordered into effect the existing provisions of the Administrative Code. Rather, it authorized the Preesident, if he saw fit, to approve an Administrative Code which the faculty itself had written and recommended as regulations for the management of the internal affairs of the University. This the President did. However, the Board of Regents is by law the governing body of the University of Washington and, as such, retains clearly within its power the right to determine the conditions of employment of the faculty and staff generally.

"Therefore, I urge that the Board study the findings of the Committee with great care and in its own best judgment arrive at a conclusion as the validity of any and all findings and recommendations placed before it in these cases." (*Id.* at 83-85.)

"Section VI of this memorandum is a summary of my findings and recommendations." (*Id.* at 86.)

"Section VI

"In summary, I am satisfied that a full and fair hearing of the charges in these cases has been af-

forded by the Committee on Tenure and Academic Freedom. Subject to final briefs by counsel for the respondents and final arguments before the Board of Regents, this memorandum represents my considered judgment on the findings and the recommendations of the Committee.

"I agree with the Committee's finding of fact concerning the Community Party, U.S.A. Having established the nature and characteristics of the party as inimicable to the future welfare of the institutions of freedom of the United States, it follows that secret membership in such a party by Butterworth and Phillips disqualifies them for membership in the faculty of the University of Washington within the causes for dismissal listed in the Administrative Code—specifically on the grounds of incompetency, dishonesty, and neglect of duty.

"In the case of Gundlach, I agree with the majority recommendation that he be dismissed, for reasons detailed in Section III of this report. I feel that I am disqualified from passing judgment on the facts underlying the recommendation of Professors Gose, Rowntree, Thompson and Williams for dismissal for neglect of duty. Rather I join with Professors Benson, Goodspeed and Densmore in their minority recommendations that Gundlach be dismissed.

"In the case of Jacobs I defer to the judgment of the Board of Regents without a recommendation. I do this because of the fact that I am personally involved in an incident of falsification by Jacobs and thus am disqualified to pass judgment. I invite attention to the fact that the Committee unanimously recommends that he be not dismissed.

"I join in the unanimous recommendation of the Committee that Eby and Ethel [illegible]e not dismissed.

"In conclusion I wish to emphasize what I have said elsewhere:

"'Freedom is essential to sound education. That

> academic freedom must be maintained in any university worthy of the name is beyond question. But academic freedom consists of something more than merely an absence of restraints placed upon the teacher by the institution that employs him. It demands as well an absence of restraints placed upon him by his political affiliations, by dogmas that may stand in the way of a free search for truth, or by rigid adherence to a "party line" that sacrifices dignity, honor and integrity to the accomplishment of political ends. Men, and especially the teacher and the scholar, must be free to think and discover and believe, else there will be no new thought, no discovery, and no progress. But these freedoms are barren if their fruits are to be hidden away and denied. Men must be free, of course, but they must also be free, and willing, to stand up and profess what they believe so that all may hear. This is an important, if not the most important part of our American heritage of freedom. It is this American heritage of freedom that must be cherished and sustained by our systems and institutions of education if they are to survive.'
>
> "RAYMOND B. ALLEN
> "*President*
>
> "January 17, 1949" (*Id.* at 107-109.)

Thus, it is clear that the record in this case presents several alternatives involving more selective procedures than do the oaths. Not one of the alternatives makes the same broadside attack on First Amendment liberties. Each has provided for security measures in a fashion such that a good faith exercise of conscience or other First Amendment rights affords a hearing which may except an individual from their application. this issue would be determined by state agencies in the same manner as other factual issues. But, the 1931 and 1955 statutes fail to make

specific provision for the exceptional, the explainable, or for the man of principle.

Observers of the onward march of security tests for public and private employment have asserted with regret that the typical casualty of such measures is not a hardened communist, but a loyal citizen with conscientious scruples. The 1931 and 1955 statutes assure this result.

This Court has held that the state must achieve its legitimate purpose by the method having the least impact on First Amendment rights. The Washington statutes questioned in this case do not meet this constitutional test. Consequently, they are unconstitutional previous restraints on freedom of expression.

This conclusion is patently clear, and it was urged to the District Court. Although plaintiff-appellants' trial brief contained some 22 pages devoted to a discussion of the prior restraint point, and although the point was orally argued, the District Court dismissed this argument with the following inadequate paragraph:

> "As to alleged prior restraints, it is unnecessary to discuss the arguments based upon plaintiffs' interpretation of the cases of *Scales v. United States*[25] and *Noto v. United States*[26] because such arguments (to the effect that a state may not prohibit an inactive knowing membership in a subversive organization and therefore may not condition public employment on an employee's undertaking to refrain from such an association) assume the premise that a state may not disqualify an individual for public employment on the ground that he engages in certain conduct or association when such conduct or association is not criminally punishable. The premise is unsound. Unreliability,[27] or insubordination[28] or lack of frankness

and candor in answering inquiries[29] may render an individual ineligible for employment without necessarily exposing him to criminal prosecution. Different standards are applicable, and Smith Act cases are not in point."

We submit that the District Court not only committed error on this point in that it reached the wrong substantive decision on the prior restraint question, but also, that it committed further error when it ignored the facts found in the record and decided this question without confronting, or exploring, the issues involved in the question, although they had been fully briefed and argued.

F. Recent Abridgments of Academic Freedom

It appears that pressures on our schools and upon our universities and colleges to become vehicles of orthodoxy have been increasing (See, e.g., 1962 enactments of Fla. Stat. §230.23, and LSA-R.S. §§2851, 2852) producing a spate of new attacks on professors and academic freedom. (See, e.g., The Lines of Attack on Academic Freedom, Part III, in MacIver, Academic Freedom In Our Time, 123-205 (1955); ACLU, Greater Philadelphia Branch, Academic Freedom: Some Recent Philadelphia Episodes (1954), and note, 42 Am. Ass'n U. Prof. Bull. 75 (1956)).

From 1945 to 1950, the American Association of University Professors had before it for consideration some 227 cases which involved academic freedom, not counting the many "situations" which are not classified as cases. Report of Committee T, 37 Am. Ass'n of Univ. Prof. Bull. 79 (1951). Later, during the decade of the fifties, legislative investigating committees heavily taxed academic

freedom. Nineteen cases have been reported, and they usually involved a faculty member who refused to answer a question, thereby stimulating an institution to undertake actions that ultimately led to dismissal. (See the chart of these cases which appears at page 16 of the Brief of the Amicus Curiae (AAUP) in *Barenblatt v. U. S.*, 360 U.S. 109 (1959)). In some of the above cases, the faculty members as well as the university administration were at fault; nevertheless, this fact does not decrease the impact of the investigations and dismissals on the "spirit of freedom" so essential for fruitful academic labor.

In addition, there were fourteen dismissals from New York City Municipal Colleges (See, 42 Am. Ass'n Univ. Prof. Bull. 71 (1956)) under a state statute which this Court later found to be unconstitutional. *Slochower v. Bd. of Higher Ed.*, 350 U.S. 551. Furthermore, R. E. Combs, counsel to the California Senate Committee on Un-American Activities, has testified that a number of college and university presidents in California have arranged for a "clearance" from the state committee of all new faculty appointees, and, privately, to receive "derogatory information" regarding their present staffs. Hearings, Subversive Influence in the Educational Process, 83 Cong., 1st Sess. pp. 605-622 (1953). Finally, it has been estimated that approximately 500 teachers (school and university) have been dismissed between 1948 and 1958, mostly for refusals to answer questions or to execute loyalty oaths as conditions of employment. See Appendix A in Brown, Loyalty and Security: Employment Tests in the United States, 498 (1958).

One point is entirely clear: fruitful intellectual labor requires, as its necessary condition, that all faculty members be possessed of a "sense of freedom." "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die." *Sweezy v. New Hampshire*, 354 U.S. 234 at 250. But, in the years which have followed World War II, when intellectual liberty has been so much under attack, one study finds that faculty members are no longer strongly possessed of a "sense of freedom." Lazarsfeld and Thielens, The Academic Mind (1958). This study showed that: (a) 46% of all the teachers who were studied felt "apprehensive" about their freedom to teach and speak freely (pp. 84-85) but, a significantly higher percentage, 54%, of those teachers who were studied but without tenure felt "apprehensive" about their freedom (p. 240); (b) this "apprehension" put a "noticeable damper on the activities and opinions" of these teachers (p. 192); (c) some professors toned down their writings and did not express their full convictions and thought in their writings and avoided assigning "controversial" reference works for discussion (p. 197); (d) some teachers avoided controversial subjects in the classroom (p. 197); and (e) some teachers found that their relationships with their students were substantially impaired (p. 204 ff).

The heavy hand of attack on academic freedom has not been foreign to the University of Washington. Although some of the following facts have been discussed under the question of nexus, they bear repetition in this

section on academic freedom. In 1947, the legislature of the State of Washington created a committee to investigate "un-American activities" in the state. That committee functioned for two years, holding two public hearings, and made its report to the legislature in 1949, two years before the enactment of the Washington Subversive Act of 1951, and six years before the 1955 amendment to that Act, the constitutionality of which is challenged in this case. The second public hearing was held on the University of Washington campus starting on July 19, 1948. During the hearings, the Washington Legislative Committee investigated at least forty faculty members, including Professor Melvin Rader, appellant here. The committee unanimously, but absolutely falsely, reported to the legislature that Professor Rader did not tell the truth when he testified before the committee and falsely reported that he had been closely associated with twelve organizations officially cited as communist fronts and subversive (P-T.O. 117). A book reporting the activity of this committee, including its hearing on the University of Washington campus, has been published: Countryman, Un-American Activities in the State of Washington, 72-332 (1951).

As a result of the committee hearings, charges were filed, before the tenure committee of the University of Washington, against six members of the University of Washington faculty, charging, in effect, that certain faculty members, at that time (1949), either were, or had been, members of the Communist Party, and that they refused to admit it. In an open letter published in early

October, 1949, University President Raymond B. Allen said that:

> "... the real question before the University of Washington is whether members of the Communist Party are qualified to serve on this University faculty, and, more specifically, whether they should be disqualified on the grounds stipulated in the Code." (Quoted from Countryman, Un-American Activities in Washington, 190-191 (1951).)

The net result of the tenure hearings was that three members of the faculty were discharged by the Board of Regents, and certain other members of the faculty, who had been so charged, were required, as a condition of continued employment, to sign affidavits that they were not then members of the communist party and, in addition, they were put on probation for two years. The tenure committee hearings, the actions by the Board of Regents, and other university investigations of the faculty were concluded in 1949, two years before the enactment of the Washington Subversive Activities Act and six years before the 1955 amendment to that Act which is challenged in this case. See, Communism and Academic Freedom: The Record of the Tenure Cases at the University of Washington (1949). There can be no doubt that there were significant and substantial invasions of rights to academic freedom at the University of Washington.

> "These are rights which are safeguarded by the Bill of Rights and the Fourteenth Amendment. We believe that there unquestionably was an invasion of petitioner's liberties in the area of academic freedom and political expression—areas in which government should be extremely reticent to tread." (*Sweezy v. New Hampshire*, 354 U.S. 234 at 250.)

> "When weighed against the great harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate." *Sweezy v. New Hampshire*, 354 U.S. 234 at 261.) (Concurring opinion.)

For further discussion see, Symposium, Academic Freedom, 28 Law and Contemporary Problems 431-671 (1963), and Note, Grounds For Removal or Suspension of Teachers, 8 So. Dakota Law Rev. 138 (1963.)

G. The Lower Court Upheld the Oaths in Issue Which Unjustifiably Infringe Upon Appellants' Constitutional Rights to Freedom of Religion, the Core of Which is Freedom of Conscience, and Thus, the District Court Must Be Reversed.

In our country, when government seeks to deal with things of the spirit, such as love of country, patriotism, and loyalty, compulsion is out of place. The promotion of righteousness by force is a very questionable procedure. The point that John Locke made about religion extends to any conviction of the spirit, such as loyalty to one's country. We submit that Locke's view lies at the very foundation of the First Amendment and should guide this Court in its decision in this case:

> "Although the magistrate's opinion be sound, and the way that he appoints be truly Evangelical, yet, if I be not thoroughly persuaded thereof in my own mind, there will be no safety for me in following it. No way whatsoever that I shall walk in against the dictates of my conscience will ever bring to me the mansions of the blessed. I may grow rich by an art that I take no delight in, I may be cured of some disease by remedies that I have not faith in; but I cannot be saved by a religion that I distrust, and

> by a worship that I abhor. . . . In a word, whatsoever be doubtful in religion, yet this at least is certain, that no religion which I believe not to be true can be either true or profitable unto me. In vain, therefore, do princes compel their subjects to come into their Church, under pretence of saving their souls. If they believe, they will come of their own accord; If they believe not, their coming will not avail them. However great soever, in fine, may be the pretence of goodwill and charity, and concern for the salvation of men's souls, men cannot be forced to be saved whether they will or no. And therefore, when all is done, they must be left to their own consciences." (Locke, *A Letter Concerning Toleration*. New York: D. Appleton—Century Company, 1937, p. 192.)

Force can compel outward observance, but not inner conviction; it will more likely turn the spirit sour than make it sweet. This is the fatal flaw in compulsory religion, compulsory loyalty or compulsory patriotism, or anything of this sort, such as loyalty oaths. If the Washington Legislature, instead of trying to isolate a professor from his society, had followed the mandate of the First Amendment and the wisdom of John Locke in the above passage, then, appellants would not be before this Court today. Instead, however, by prescribing that the 1931 and 1955 oaths are conditions of employment, the Washington legislature has chosen force, the threat of force and the threat of dismissal as techniques for obtaining inner conviction and the control over the minds of the faculty at the University of Washington. We think that the First Amendment does not allow a state legislature to make this choice, for as this Court stated in *West Virgina v. Barnette*, 319 U.S. 624, 642:

"If there is any fixed star in our constitutional con-

stellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion *or force citizens to confess by word* [precept] *or act* [example] *their faith therein.*" (Emphasis supplied.)

It is no longer open to question that the religion clause of the First Amendment is applicable to the States as well as to the Federal Government. Its applicability extends equally to the no "establishment" clause and the "free exercise" clause, both of which are invoked here by appellants. Under these clauses, state legislatures are equally forbidden to enact, or enforce, any laws respecting an establishment of religion or prohibiting its free exercise, or forcing an abridgment of conscience. *Cantwell v. Connecticut*, 310 U.S. 296; *Murdock v. Pennsylvania*, 319 U.S. 105; *Marsh v. Alabama*, 326 U.S. 501; *Everson v. Board of Education*, 330 U.S. 1; *McCollum v. Board of Education*, 333 U.S. 203; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94; *Engel v. Vitale*, 370 U.S. 421; *Pa. v. Schempp*, 374 U.S. 203.

The purposes of these two clauses combine into the great teaching of the First Amendment that when government is neutral in the field of religion and conscience that government better serves all religious interests, whatever creed may be involved, or lack thereof. If a religious leaven is to be worked into the affairs of our people, it is to be done by, and through, private individuals and groups, not by government. By reason of the First Amendment, government can have no interests in theology, rituals or "undivided allegiances," for on these matters government must be neutral. The philosophy of the First Amend-

ment is neither one of friendship nor hostility to religion or religious observances. The man of faith, and no less, the atheist or agnostic—the nonbeliever—is entitled to go his own way. If government interferes in matters spiritual, it will be a divisive force, and the First Amedment commands neutrality (*Murray v. Curlett*, 374 U.S. 203; *McCollum v. Board of Education*, 333 U.S. 203; *Torcaso v. Watkins*, 367 U.S. 488; *McGowan v. Maryland*, 366 U.S. 420; *Engel v. Vitale*, 370 U.S. 421.)

The very core of the First Amendment's guarantee of freedom of religion lies in a deep respect and protection for freedom of conscience of each human being subject to that Amendment. The purpose of the First Amendment's religious clauses is to protect conscience from governmental invasion. (See, Madison's Memorial and Remonstrance Against Religious Assessment, annexed as Appendix to *Everson*, 330 U.S. at 63.)

What a man thinks or believes, and his inner allegiances and their reasonable outward manifestations, are of no concern of government. A union of government and religion tends to destroy government and to degrade religion.

> "Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." (*West Va. v. Barnette*), 319 U.S. 624, 636-7.)

Advocacy, academic inquiry and belief go hand in hand. There can be no true freedom of religion, freedom of

mind or freedom of conscience if thoughts and their expressions are pent up. Yet, all appellants are fearful that if they be required to execute Oath forms A or B, they will subject themselves to harrassment and the threat of perjury (See R. 188). They are all of the opinion that they cannot execute the oaths without emotional anguish due to having to compromise their "principles, beliefs and consciences." (R. 188.) They all consider the oaths in question to be an affront to their consciences and to their personal and professional integrity. (R. 188.) We believe this Court foresaw this case when it said that: "The First Amendment gives freedom of mind the same security as freedom of conscience." (*Thomas v. Collins*, 323 U.S. 516, 531.)

Two appellants, Professors Matchett and Orians, are members of a religious order known as the Society of Friends (Quakers) (See R. 189). To them, religion is a matter of individual conscience and this Order is well known for its pacifism and respect for the individual consciences of all men everywhere. The Quakers, or Friends, are a well-known religious denomination which rejects all institutionalized or collective prayer. In the "Epistle to the Reader" prefixed to the "Great Mystery," of George Fox, the founder of the Quaker movement, Edward Burrough, who became a Quaker in 1652, wrote (cited in Hastings, *Encyclopedia of Religion and Ethics* (1941) Vol. VI, p. 143):

> "In all things we found the light which we were enlightened with all . . . and so we ceased from the teachings of all men, and their words and their worship and their temples and all their Baptisms, and

> their Churches . . . and we met together often, and waited upon the Lord in pure silence, from our own words and all men's words and hearkened to the voice of the Lord . . . and while waiting upon the Lord in silence as often we did for many hours together . . . we received often the pouring down of the spirit upon us and we spake with new tongues, as the Lord gave us utterance and as his spirit led us . . ."

Appellants, Matchett and Orians, are devoutly of the conviction that their sole and undivided allegiance must be to their God and through their God to peace for all men, everywhere—East as well as West—and not to any government, good, bad or indifferent. They consider that were they to take these oaths they would contribute to their own spiritual undoing (R. 189). Thus, the 1931 and 1935 oath utterances are forbidden to them. If these oaths be taken literally, they require that these two appellants "by precept and example" not only utter words and commit acts in which they do not believe, but which contradict their religious scruples. It is well known that the Quakers, and appellants Matchett and Orians, are pacifists who have long held the view that war and the current nuclear arms race are immoral. Yet, the 1931 oath demands that they, by *precept* and *example*, promote an *undivided allegiance* to the "*government of the United States*" which is heavily engaged in the nuclear arms race. The 1955 oath disallows them speech and association with Communist Chinese, Russians and others, people with whom Matchett and Orians are directed by their religious principles to love, nurture and associate. The oaths, therefore, require them to contradict and abandon their religious principles.

Appellants here have standing to raise this issue, and have done so. Measured by First Amendment standards, and considering them in light of the record, we submit here, as in the court below, that the oaths in question cannot stand. After stating that appellants had challenged the 1931 and 1955 oath statutes on freedom of religion and conscience grounds (215 F. Supp. at 444) the District Court, below, did not rule upon appellants' contentions. We think the District Court should be reversed.

The No-Establishment Clause

Five times within the past fifteen years this Court has spelled out the meaning of the no-establishment clause. In four cases, this Court defined this clause in substantially identical language: (*Everson v. Board of Education*, 330 U.S. 1, 15-16; *McCollum v. Board of Education*, 333 U.S. 203, 210-211; *McGowan v. Maryland*, 366 U.S. 420, 443; *Torcaso v. Watkins*, 367 U.S. 488, 493):

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

If anything can safely be said to be settled in constitutional law, it is that the First Amendment's no-establishment clause means what the above quoted words say. The Fifth case, *Engle v. Vitale,* 370 U.S. 421, in part, goes to a slightly different aspect of the meaning of the establishment clause, but it reaffirms the view cited above.

The two clauses of the First Amendment join in a common purpose. In most cases, the clauses are fungible. Nevertheless, they are not identical in every respect:

> "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, *does not depend upon any showing of direct governmental compulsion* and is violated by the enactment of laws which establish an official religion *whether those laws operate directly to coerce nonobserving individuals or not. (Engle v. Vitale,* 370 U.S. 421, 430-31, and see *Pa. v. Schempp,* 374 U.S. 203 at 256, note 21.)" (Emphasis supplied)

A Distinction Between the No-Establisment and Free Exercise of Religion Clauses

This Court might choose to follow a distinction suggested by some of the cases cited above. See *Everson, McCollum, McGowan* and *Torcaso.* The distinction is that: If compulsion is exercised to impel participation in *religious* conduct, it constitutes a law respecting an establishment of religion as well as one prohibiting the free exercise thereof. If, on the other hand, it impels partici-

pation in *secular* conduct, it can only be a law prohibiting the free exercise of religion.

Should this Court choose to follow this distinction, characterizing the 1931 and 1955 oaths as "secular," then we submit the two oath statutes are unconstitutional as to all appellants, and others similarly situated, in that they prohibit their free exercise of religion and consciences and force them to abridge their consciences, and that this is particularly true of appellants Matchett and Orians.

As the cited cases state, it would be a violation of the establishment ban to "force . . . a person to go to . . . church . . . or . . . to profess a belief or disbelief in any religion." Going to church and professing belief in religion are obviously religious acts and coerced participation establishes religion no less than it prohibits its free exercise.

On the other hand, non-polygamous marriages (*Reynolds v. United States*, 98 U.S. 145); military training (*Hamilton v. Regents of the University of California*, 293 U.S. 245); vaccination (*Jacobson v. Massachusetts*, 197 U.S. 11); saluting the American flag and pledging allegiance to it (*West Virginia State Board of Education v. Barnette*, 319 U.S. 624); abstaining from labor one day weekly (*McGowan v. Maryland*, 366 U.S. 420) are all deemed to the general community and the courts to be secular rather than religious matters and compulsion with respect to them does not violate the ban on establishment of religion, although it may (or may not) violate the ban on laws prohibiting the free exercise of religion.

An examination of the *Barnette*, *Everson*, *McCollum*, *McGowan* and *Torcaso* cases, *supra*, will illustrate the distinction. In *Barnette*, this Court held that students, children of Jehovah's Witnesses, could not be compelled by public school authorities to participate in the flag salute ceremony. Such coercion, it was held, prohibited the free exercise of their religion in a manner forbidden by the Constitution. Since, however, the ceremony is generally deemed a patriotic or secular one, rather than a religious one, there was no suggestion that the public school authorities were required to discontinue it as part of the regular public school program because a child could be given permission not to participate. Not so with the oath statutes here.

In *Everson*, this Court, by a vote of 5 to 4, upheld the use of public funds to transport children by bus to private and parochial schools. The majority held that this was secular conduct whose purpose it was to protect children from the hazards of the road. (This Court interpreted the challenged statute to apply to all private schools, secular as well as religious.) Hence, there was no violation of the establishment ban, even though the public funds so expended were raised by compulsory taxation of citizens.

In *McCollum*, the conduct complained of was clearly religious. Hence, the Court did not issue a judgment which would simply have secured the right of the plaintiff's child not to participate in the religious program, but decreed that the conduct should be discontinued and eliminated.

In *Zorach v. Clauson*, 343 U.S. 306, not mentioned above, a majority of this Court held that the gravamen of the plaintiffs' complaint was that public school sessions continued while off-premises religious instruction was taking place. Under this analysis of the case, the Court held that there was no violation of the establishment ban since the conduct—continuation of secular instruction—was purely non-religious.

In *McGowan*, the majority of this Court held that the present purpose of the challenged Sunday laws was to assure a common day of rest, recreation and family togetherness. This is obviously a secular purpose and the laws were therefore held not to violate the non-establishment clause.

In *Torcaso v. Watkins*, on the other hand, the purpose of requiring affirmation of a belief in the existence of God was clearly and exclusively religious. Hence, the Court held it beyond the competence of the State under the First Amendment.

The distinction is a critical one. For if the act is secular it is within the constitutional competence of the state, and therefore the sole question remaining is whether a particular religiously-motivated person has a constitutional right under the free exercise clause to be excused from participating therein. (This, according to a bare majority of this Court, depends upon the balancing of the secular needs of the community against the religious rights of the individual.) On the other hand, if the conduct is religious, then it is outside the competence and jurisdiction of the state or its instrumentalities, and even if participation

were not compulsory the conduct would be unconstitutional.

The Free Exercise of Religion Clause

It follows from this analysis that the appropriate remedy will differ in the two types of cases. If only free exercise is involved in that the conduct is secular, i.e., the taking of the two oaths, then the sole right of the religiously-motivated dissenter is to be excused from participation. The practice is to be discontinued only if there is no possibility of excuse. Conversely, if establishment is involved in that the conduct is religious, the constitutional redress is not to excuse the dissenter but to discontinue the practice (for the state has no constitutional power to enter into it in the first place).

In the case at bar, the statutes are summary. They do not afford the opportunity for a religious or conscientious objector, to be excused; nor do they offer him the opportunity to explain, defend or justify his refusal. Instead, the statutes operate summarily, or after a sham hearing, where no justification for refusal can be accepted, and therefore they operate arbitrarily, invading the First Amendment's guarantee of freedom of conscience and freedom to exercise one's religion. The 1931 oath statute expressly declares that appellant's contracts are void; there is no alternative. There is no way to excuse a person or to discontinue the practice with respect to this statute; consequently, the 1931 statute must be declared, and is, unconstitutional. The 1955 statute requires that faculty members, with and without tenure, execute the

oath as a condition of continued employment. There is no alternative, and it, too, is unconstitutional.

We submit that there is no privilege of non-participation. The statutes do not so admit. Nor does a realistic assessment of the situation honestly afford a choice. The challenged oaths are not immune from invalidation under the free exercise clause of the First Amendment. A professor's free conscience is at stake, as are his tenure rights, his livelihood, his reputation and his credit standing. To say there is no coercion here is to indulge pure fiction. In Constitutional Law:

> "It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test." (Mr. Justice Hughes in *Electric Bond & Sec. Co. v. SEC*, 303 U.S. 419, 440.)

Non-physical coercion is well recognized in Anglo-American law. The concepts of "undue influence" in equity jurisprudence and the law of wills and testaments are illustrations of every-day applications of the principle that psychological coercion can be as effective in reality and as amenable to redress in law as physical coercion. A psychologically coerced confession is as inadmissible in a criminal case as one procured through physical force. (*Chambers v. Florida*; 309 U.S. 227; *Malinski v. New York*, 324 U.S. 401; *Leyra v. Denno*, 347 U.S. 556.)

In the area of the relationship of church, state and conscience there is ample authority for giving judicial recognition and legal effect to non-physical coercion. In the *Everson*, *Engle* and *McCollum* cases, the Court stated that under the First Amendment a state may not only not

"*force*" a person to participate in a religious act or profess a religious belief, but it likewise may not "*influence*" him to do so. This view has long been held. (See: *Tudor v. Bd. of Ed.*, 14 N.J. 31, 100 A.(2d) 857, cert den. 348 U.S. 816; *People ex rel. Ring v. Bd. of Education*, 245 Ill. 334, 351; *State ex rel. Weiss v. District Board*, 76 Wis. 177, 199-200.)

> "Whether the First Amendment to the Constitution will permit officials to order observance of ritual of this nature does not depend upon whether as a voluntary exercise we would think it to be good or bad or merely innocuous. Any credo of nationalism is likely to include what some disapprove or to omit what others think essential, and to give off different overtones as it takes on different accents or interpretations. If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include the power to amend. Hence, validity of the asserted power to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question." (*West Va. v. Barnette*, 319 U.S. 624, 634.)

The statutes requiring the 1931 and 1955 oaths cast their nets too broadly and are well beyond the power of a state legislature. The command of the First Amendment that there shall be no law establishing or prohibiting the free exercise of religion must prevail:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach

> of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend upon the outcome of no elections." (*West Va. State Bd. v. Barnette*, 319 U.S. 624, 638 (1943).)

The decision of the District Court, below, should be reversed.

II.

The District Court Upheld the 1931 and 1955 Enactments Although Said Enactments Infringe Upon Freedom of Expression Without Affording a Hearing, and Although They Shift the Burden of Proof; Each of Which Is In Violation of Due Process of Law.

A. The Lack of a Hearing

The District Court's opinion clearly indicates that this question was troublesome: "As in the prior litigation arising out of this statute, the question whether or not an employee who refuses to subscribe to the loyalty oath will be afforded a hearing prior to discharge presents a substantial issue of due process."

But, instead of deciding this question, the lower court assumed it away by assuming the existence of facts not found in the record and without exploring the issues this question presented, and without considering, indeed ignoring, the expressly stated policy of the Washington legislature, the Board of Regents and the Washington State Supreme Court on this point. The District Court held: "The fact that refusal on any ground is declared to be cause for immediate termination of employment does not close

the door to hearing and inquiry; nor does it preclude the exercise of administrative discretion if it should appear that the refusal to sign the oath is in no way related to a willful refusal to make disclosure as to whether or not the employee is a member of a subversive organization. . . . As was pointed out earlier in this opinion, in this declaratory judgment proceeding the dismissal policies and hearing procedures which would actually be put into effect by the University administration under the statute and/or under its own rules and regulations are a matter for speculation. On the showing here made this court will not presume that the defendant state officials will act arbitrarily or in disregard of constitutional rights of public employees, but this court must assume that the statute will be administered and applied in a constitutional manner.[49]" (215 F Supp. at 451 and 452.)

We submit that state policy on this point is not a matter for speculation.

State policy on this matter has been established. Facts occurring subsequent to the date this Court declined jurisdiction in *Nostrand v. Little*, 368 U.S. 436, close the door to effective hearing and inquiry. They show that the infringement upon freedom of expression is without a meaningful hearing afforded to any employee at which he could explain or defend his refusal to execute the oaths. This is the state policy declared by the Washington legislature, and followed by the Board of Regents and the Washington Supreme Court, and which was ignored by the lower court. It will be demonstrated as follows:

On or about May 25, 1963, as shown by a memorandum

from President Odegaard (R. 169, 176) which in part, demanded that appellants execute the oaths in question in this case, and which they have refused to sign, the Board of Regents of the University of Washington adopted the following statement relative to those faculty members having tenure who should not sign the proffered oath:

> "If any member of the faculty having tenure should fail to comply with the requirements, be given notice of termination of employment, and appeal to the tenure committee, it *should be indicated that the grounds for termination are failure to comply with a provision of Washington State law which is binding upon the Board of Regents.*
>
> "Attention should be directed to Section 2511 of the Faculty Code and to the underlined portion thereof:
>
> "'The University of Washington Regents accept in principle the concept that tenure for members of the faculty is essential for effective teaching and sustained productivity in scholarship.
>
> "'They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, maintaining and retaining, however, the responsibilities and obligations of the Board of Regents, as defined in the laws of the State of Washington.'
>
> "In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow customs on tenure described in Chapter 25 of the Faculty Code. The Board, *however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the State of Washington, and, therefore, cannot waive requirements as to employment specifically set by law*

with reference to the execution of the statement and oath." (Emphasis supplied.)

This statement by the Board of Regents evidences that it adopted a new ground for dismissal of tenured faculty: failure to execute the oaths here in question. In meeting the responsibilities and obligations imposed upon the Board by the Laws of the State of Washington (including Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955), it cannot waive the requirements of the acts in regard to the execution of the oaths; and thus the customs affecting professors with tenure, as described in Chapter 25 of the Faculty Code, cannot and will not be followed. In short, any tenure hearing would be a sham because no explanation or justification for refusal to sign the oaths could be accepted. Yet, these very rules and regulations, before amendment by the Board of Regents were relied upon by the Supreme Court of the State of Washington (and as set forth in the appendix to the decision of *Nostrand v. Little*, 58 Wn.(2d) 111, at 135-137) as affording a hearing to Professors Nostrand and Savelle, holders of tenure. At page 131 the Washington court held:

> "We are of the opinion that the provision, in the subversive activities act to the effect that refusal to take the oath 'on any grounds' shall be cause for 'immediate termination of employment' should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract is deprived of the right to a hearing as provided in the rules and regulations of the University. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing

before the tenure committee and to the other procedures relating to termination of employment prescribed in the University's rules and regulations, set forth in the appendix to this opinion."

The ruling by the Board of Regents accords fully with the intent of the Washington legislature as it is revealed by the structure of the oath statute itself. Section 1 of Chaper 377, Laws of the State of Washington, 1955 (RCW 9.81.070, the statute under scrutiny), provides that refusal to execute the anti-subversive oath *"on any grounds* shall be cause for *immediate termination* of such employee's employment" (Emphasis supplied). RCW 9.81.060 provides that no subversive person as defined in the Act, shall be eligible for employment by the State or political subdivision. These two sections can have only one meaning—ignored by the District Court—that no matter what reason an employee has for belonging to a "subversive organization," nor what is the nature of his association therewith, or the purpose thereof, nor why he is unable or unwilling to execute the oath, nevertheless, he is subject to immediate and automatic discharge without any realistic opportunity to be heard or to explain his refusal to execute the oath. There are no exculpatory grounds.

If there were no possible explanation or defense for a refusal to execute the oath, or for affiliation with a subversive organization, then it might be said that hearing and notice would be unnecessary because such refusal or affiliation would be an inevitable concomitant of unfitness or disloyalty. It takes little imagination, however, to picture a number of situations which would cause a professor at the University to refuse to sign this oath and

which situations would in no way reflect on the employee's loyalty or fitness for the job. The professor might be associated with a subversive organization for counter-espionage purposes in connection with either governmental or patriotic organizations. He might belong for the purpose of sociological study of "fringe organizations" or to satisfy his personal intellectual curiosity as to the functioning of such organizations, or he might belong solely to get the benefits from the wholly lawful aims of the organization or to assist in such lawful aims, while eschewing its disloyal aims. (Cf. *Scales v. U.S.*, 367 U.S. 203; *Bridges v. Wixon*, 326 U.S. 135.)

In none of these situations should his membership reflect in the slightest degree on his loyalty or on his fitness for employment. Thus, even knowing membership in a subversive organization may be innocent in the sense that it involves neither a guilty mind nor a danger to the state. And yet his membership, under the statutes at bar, would either (1) be the basis for his refusal to take the oath and thus incur immediate dismissal from State employment under Section 1 of the 1955 Act, or (2) would require a false statement under oath that he is not a member of the subversive organization which in turn would disqualify him for public employment pursuant to RCW 9.81.060, and qualify him as a target for a perjury action. There is no middle ground.

Moreover, by now it has been clearly demonstrated that such a "disclaimer oath" is exceedingly offensive to a large and respectable segment of our citizenry. A number of universities have refused substantial student scholarship

grants under the National Defense Education Act of 1958, solely because this Act requires a student-applicant to execute an oath very similar to the oath prescribed by the Washington State Statute. (R. 184.) Both individually and through such representative organizations as the Association of American Colleges, the Association of American Universities, the American Association of Land Grant Colleges and State Universities, the National Association of State Universities, the American Association of University Professors, and the Association for Higher Education of the National Education Association, the colleges and universities of the United States have vehemently protested this affidavit requirement in the National Defense Education Act and have urged its repeal. (See Hearings before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, April 29 and May 5, 1959.) And, finally, Congress has repealed it. If the taking of an oath, such as the ones under scrutiny, is so deeply offensive to such an important segment of our society, it is reasonable to assume that the Washington disclaimer oath will be refused by at least some loyal and worthy citizens, such as appellants in this case, simply because of its offensive and insulting nature. And yet, such a refusal "on any grounds" shall be cause for "immediate termination" of employment. No meaningful opportunity is afforded a State employee, appellants here, to explain or defend his failure to execute the oath or his affiliation with a "subversive organization." And, under Washington statutes and the above University rulings, no reasonable explanation justifying a refusal to execute the oaths can be accepted as an exculpatory ground.

"If he declines to sign, the employee is subject to immediate discharge." *Nostrand v. Little*, 58 Wn.(2d) 111 at 125, and see discussion in Murphy, An Emerging Constitutional Right, 28 Law and Contemp. Probs. 447 at 479-81.

The Washington Supreme Court has expressly declared state policy which stimulated the ruling by the Board of Regents on May 25, 1962, discussed above. That court has determined that if a tenured professor should request a hearing and refuse to execute the oaths, then he should be dismissed solely for that reason. Thus, the hearing afforded tenured professors is a sham. The Washington Court, twice, has declared state policy on this point. In *Nostrand v. Little, supra*, at page 131 the Washington Court said: "If he does not wish to sign the oath, he may seek private employment." This statement is simply an affirmation of the position of the Washington Court in its earlier case involving these statutes:

> "Respondents [Professors] are not compelled by section 12 [the section requiring the 1955 oath] to do anything. But if they desire to remain in public employment, they must comply with the standards of eligibility established by the legislature, and *their refusal to do so renders them ineligible for further employment*" (emphasis supplied). *Nostrand v. Balmer*, 53 Wn.(2d) 460 at 477, also see p. 483.)

The Washington Supreme Court has indicated that non-tenured professors are not entitled to a hearing. It has been very careful to limit the areas in which hearings would be granted, limiting these areas to persons holding tenure or civil service rights. At page 123 in *Nostrand v. Little, supra*, it stated:

> "This court has very recently held in *Yantsin v. Aberdeen*, 54 Wn.(2d) 787, 345 P.(2d) 178 (1959), that, in the absence of civil service or other tenure rights, public employees may be discharged by their employers without any reason being assigned therefor. . . . Since the power to discharge is absolute except for such tenure rights, the discharged public employee is not entitled to a hearing regarding the reason for his discharge."

There can be no question argued regarding the Civil Service Act. This act is RCW 41.06. That statute is clear in that the non-tenured appellants in this case are not entitled to a hearing under the State Civil Service Law. Non-tenured employees would include both non-tenured faculty and certain other employees of the University having no teaching responsibilities. Section 7 of that Act clearly provides:

> "The provisions of this act do not apply to . . . (3) Academic personnel of the institutions of higher learning and other such positions as are exempted under section 5 of this act; . . ."

The other exemptions in Section 5 include students, part-time or other temporary employees, and "part-time professional consultants." Thus, clearly all non-tenured appellants in this action are not afforded a hearing by the Civil Service Act.

In addition, the Washington court also decided other questions relating to state law and which had been argued in *Nostrand v. Little*, *supra*, by the Attorney General to govern the professors' right to a hearing. This holding is extremely significant for the appellants in this case who are non-tenured and thus, receive no hearing under the

tenure code. The Washington Supreme Court stated that the Administrative Procedures Act has no application to the University of Washington regarding the execution of the oaths in this case:

> "The regents have urged, in their reply brief, that the professors are entitled to a hearing under the model state administrative code (Laws of 1959, chapter 234, RCW 34.04.010 et seq.), citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 94 L. Ed. 616, 70 S. Ct. 445. However, we are of the opinion that this 1959 statute was not intended to supersede established procedure adopted by the regents pursuant to RCW 28.77.120 and 28.77.130. There is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington which have been in effect for fifty years."

This Court, in many circumstances, has had to look behind an administrative hearing or trial to see whether it has been a hearing in fact. If this Court finds that only a sham hearing took place, where a real hearing is required, then, it has struck down the results of the sham hearing as a violation of due process of law. See, *Moore v. Dempsey*, 261 U.S. 86, (mob-dominated trial); *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673, (no real trial of issues in a civil suit); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, (immigration hearing board failed to exercise its statutory discretion due to acts of Attorney General); *Tumey v. Ohio*, 273 U.S. 510, (Pecuniary interest of Judge in result of trial); *Powell v. Alabama*, 287 U.S. 45, (court-appointed counsel found not to have been adequately representing defendant); *Thompson*

v. Louisville, 362 U.S. 199, (lack of evidence made conviction a denial of due process).

In this case, the alleged hearing, based solely on the issue of whether or not the professors have signed the oath, has a predestined outcome since their failure to sign the oath will itself be the occasion for its being, and the irrebuttable evidence sufficient for dismissal. The "hearing" is consequently a meaningless act and will not serve to protect the tenured professors' rights. There is no possibility of any tenured professor advancing any ground, however reasonable, which might justify his refusal to take the oaths. This sham hearing in the case of tenured professors, and the even more summary dismissal of the non-tenured professors, constitutes arbitrary action of the state under the doctrine of *Slochower*.

In *Slochower v. Board of Education of New York*, 350 U.S. 551, this Court pointed out that, even though "a person does not have a constitutional right to government employment," his dismissal "must comply with reasonable, lawful, and non-discriminatory terms" (p. 555). In the majority opinion in that case, Mr. Justice Clark stated:

> "... *Adler v. Board of Education*, 342 U.S. 485, 96 L.ed. 517; 72 S. Ct. 380, 27 ALR (2d) 472, upheld the New York Feinberg Law which authorized public school authorities to dismiss employees who, *after notice and hearing*, were found to advocate the overthrow of the Government by unlawful means, or who were unable to explain satisfactorily membership in certain organizations found to have that aim. Likewise, *Garner v. Board of Public Works*, 341 U.S. 716, 720, 95 L.ed. 1317, 1322, 71 S. Ct. 909, upheld the right of the City to inquire of its employees as to matters that may prove relevant to their fitness and

> suitability for public service,' including their membership, past and present, in the Communist Party or the communist political association . . ." (Emphasis supplied.)

In both *Adler* and the *Garner* cases, the employee was afforded an opportunity for a hearing at which he could explain his position and defend himself from any implications of disloyalty or unfitness.

Later, at page 559, in the *Slochower* case, this Court held:

> "This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College. The state has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continual employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. *We hold that the summary dismissal of appellant violates due process of law.*" (Emphasis supplied.)

The statutes requiring the "1931 oath" and those requiring the "1955 oath," in the case at bar, are as summary and therefore as unconstitutional as was the charter provision struck down in *Slochower*.

Both the Washington State Supreme Court earlier, and, in the case at bar, the District Court, tried to uphold the 1955 statutory requirement on the ground that it constituted an investigation of the qualifications (including loyalty) of state employees. However, the procedures involved in this case are very definitely not investigative, but constitute an arbitrary prerequisite for obtaining or continuing to hold state employment. No employee is

allowed to give information; instead, he must give the right answer. The automatic and summary manner of dismissal for failure to give the right answer points up the conclusion that this requirement is not an inquiry into the fitness of the employee, or into his loyalty, or a search for information, but is purely a punitive step designed to penalize those who will not or cannot take the oaths.

Perhaps this requirement might exclude some disloyal or otherwise unfit employees, but at the same time it also excludes loyal and fit employees without recourse and/or an opportunity to show their loyalty and fitness. Since indiscriminate classification of innocent with knowing activity offends due process, *Wieman v. Updegraff*, 344 U.S. 183, a meaningful opportunity must be afforded the employee to prove his innocence despite membership in a subversive organization or refusal to take the oath. Such an opportunity is not only lacking in this case but is expressly prohibited by the use of the words "on any grounds" in the statute. This violates the fundamentals of due process of law, and error was committed by the District Court in not so holding.

The 1931 statute operates even more summarily:

> "Sec. 4. It shall be unlawful for any person authorized to issue license to teach or any school board to hereafter issue any new license to teach in the state or execute any contract or renewal thereof with any person or persons who fail or refuse to execute the oath or affirmation herein provided and any contract executed or renewed or license issued in violation hereof shall be and is hereby declared to be null and void."

The District Court fully agreed that the statute is clear

and agreed that the operation of the 1931 statute is summary:

> "In view of the mandatory language of the statute there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath."

We submit that the District Court committed further error, and abuse of discretion, when it declared that the 1931 statute is clear and that it operates automatically, but failed to declare it arbitrary, and hence, unconstitutional as a deprivation of a due process of law.

B. Shifting the Burden of Proof.

Speiser v. Randall, 357 U.S. 513, was a case in which this Court struck down a California oath, less drastic in breadth than the ones questioned in this case, and which was required before property owners could qualify for a tax exemption. This Court held that since the oath infringed upon freedom of expression, and, since it did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer" (*id.* at 529), then, it constituted a violation of due process of law. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure," namely, execute the oath as a condition of obtaining a tax exemption. The procedure was invalid, placing an unconstitutional burden on free speech, and because of this, appellant could not be denied a tax exemption for failure to execute the oath—for refusing to take the first step in an invalid series.

We submit that *Speiser v. Randall* applies to this case in at least two ways. On the one hand, appellants here have been demanded, as they were in *Speiser*, to take the first step, execution of the oath, in an invalid series of steps which are procedurally defective, namely, they deprive appellants of due process because neither the 1931 nor 1955 statutes offer a hearing as pointed out above. There can be no doubt of the burden on free expression in this case.

On the other hand, we submit that in the case at bar, as in *Speiser*, there is a shifting of the burdens of persuasion and proof, under the threat of perjury prosecution and loss of employment, etc., achieving the same practical, but constitutionally forbidden, result: The deterrence of free expression which was disallowed in *Speiser*. In that case this Court, at page 526, stated:

> "The vice of the present procedure is that, when particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear those burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, Cf., *Dennis v. U.S.* , provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the state could not

command directly. It can only result in a deterrence of speech which the constitution makes free."

The 1955 oath clearly places the burden of persuasion and proof onto appellants, necessarily resulting in a deterrence of speech which the Constitution makes free. It presumes the guilt, and non-employability of all state employees, appellants here, presuming either that they advocate the prohibited doctrines or that they are members of the prohibited organizations. If and only if an appellant comes forth and executes the expurgatory oath will he become a member of the favored group, the group eligible for state employment. The oath is exacted from all alike—the loyal and the disloyal. In other words, the oath presumes non-employability and then shifts onto appellants the task of understanding the complex statutory definitions of subversion and then requires appellants to make their declarations, only one answer of at least three possible ones being acceptable.

Nor is this the end of the matter. If appellants execute the 1955 oath, there remains under Washington statutes the possibility of further interrogations, conducted pursuant to the 1951 Washington Subversive Activities Act, and in which appellants are under statutory requirement, on pain of loss of employment, to come forth, under oath, and further to prove the negative of these complex statutory definitions, and otherwise satisfy their inquisitor. Thus, in this case, as in *Speiser*, the burdens of proof and persuasion are placed on appellants throughout the procedure.

But, even so, there is yet another hurdle for the profes-

sorial appellants here. They must execute, annually, still another oath, the 1931 oath of undivided allegiance, in order to qualify for their professorial jobs. If they execute the 1955 oath but refuse to execute the 1931 oath, then, the 1931 statute operates summarily, making their teaching contracts "null and void." This total procedure clearly constitutes an unconstitutional burden on free expression and is unconstitutional under *Speiser v. Randall.*

It is no answer to argue—as the District Court did—that *Speiser* does not apply because the oath statutes, as applied in this case, serve to protect the State from an evil sufficiently grave to justify the infringements upon free expression. The lower court's position is defective because the record in this case fails to reveal, as pointed out above, any nexus between appellants and any evil; and further, it is barren of any showing of a subordinating state interest which is compelling. These are the burdens for the State, appellees here, to show. In addition to this error, the District Court committed another: it failed to follow this Court's analysis in *Speiser.* In *Speiser* this Court held inapplicable the principles of *Garner v. Board of Public Works,* 341 U.S. 716; *Gerende v. Board of Supervisors,* 341 U.S. 56, and *American Comm. Association v. Douds,* 339 U.S. 382, for the reason that in those cases "the loyalty oath, once signed, became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath, he retained his position." It is clear, as shown above, that even though appellants were to execute the oaths here, that act alone would not be conclusive evidence: further loyalty proceedings are expressly authorized under the 1951 Act which has been incorpo-

rated into the administrative code of the University. Nevertheless, the District Court cited the cases above, distinguished by this Court in *Speiser*, and then held that, because of the applicability of those cases, "*Speiser* is therefore not controlling."

We submit the lower court committed error and abused its discretion when it dismissed appellants' complaint with prejudice in full recognition of the facts that the statutes here in question shift the burdens of persuasion and proof, without a hearing, and therefore, in violation of due process of law. We submit this erroneous ruling is material, and that the District Court should be reversed.

III.

The District Court Upheld the Oath Statutes in Question Here Even Though They Infringe Upon Freedom of Expression in That They Use Terms Which are Vague, Fluid and Indefinite, in Violation of Due Process of Law.

In a series of cases, this Court has held that a state has no power, under the First and Fourteenth Amendments, to forbid or to command an act which is defined by terms so fluid and vague as not to be susceptible to objective measurement thereby forcing men of common intelligence to guess at their meaning and to differ as to their applications. *Winters v. New York*, 333 U.S. 507, and *Lanzetta v. New Jersey*, 306 U.S. 451, and cases cited therein. Moreover, the doctrine prohibiting unconstitutional vagueness gives additional protection to the several freedoms established by the First Amendment. *Winters v. New York, supra*, and see Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67 (1960).

Thus, this Court, in *Smith v. California*, 361 U.S. 147 at 151, declared:

> "This Court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser."

This Court has indicated that an oath, less sweeping in its infringement upon free expression than the one required by the 1955 statute, had a potentially inhibiting effect on speech. *Speiser v. Randall*, 357 U.S. 513. Furthermore, this Court has held that the doctrine announced in *Smith v. California, supra*, is fully applicable to oaths which a state may require as a condition of employment. *Cramp v. Florida*, 368 U.S. 278 at 284.

In striking down the vague statute presented by *Winters v. New York*, 333 U.S. 507 at 518, this Court appears to have forecast the advent of this case when it said:

> "The next [case] may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."

Thus, it is clear that strict standards against vagueness should be applied in this case involving as it does the penal definitions of "subversive persons" and "subversive organizations," and the threat of a perjury prosecution of professors at a great American University devoted to academic freedom and political expression. Cf. *Sweezy v. New Hampshire*, 354 U.S. 234.

Nevertheless, the District Court, invoking the canon of "reasonable construction"—something it inconsistently re-

fused to do with the vague portions of the 1931 oath—upheld the 1955 oath:

> "It is our view that a reasonable construction of the statutory language does not leave the meaning uncertain or vague—in any event not to the extent that the statute must or should be held unconstitutional in an action such as this. The words used are to be understood in accordance with the ordinary meaning of the words in current usage."

To determine the ordinary meaning of the Washington Statute, the District Court reproduced portions of Webster's New International Dictionary (2nd ed.). As was done in *Lanzetta v. New Jersey*, 306 U.S. 451 at 456, we set forth the oath required by the 1955 statute. The words in brackets are the words which the District Court held to supply meaning to the word immediately preceding the bracket, and, in the view of the District Court, thereby render that word, and the complete oath, clear and not a subject for speculation, or unconstitutional vagueness.

On the pain of loss of employment, or subsequent perjury prosecution, a professor must now swear that he *understands* the following:

> "Subversive person means any person who . . . advocates, abets [incites, encourages, instigates or countenances; in a disparaging sense] advises or teaches by any means [in any way; possibly, or at all] any person . . . to aid in the commission of any act intended . . . to assist [to lend aid; to help] . . . in the alteration of the constitutional form of government . . . by revolution, force or violence . . ."

We submit that the opinion of the District Court in no way clarifies or makes certain the oath, but rather, its opinion makes the oath broader and the meaning of the

oath more fluid and obscure than previously, and that the lower court committed error when it upheld the existence of this vague and fluid oath, because in its entirety, as well as in its several words, it infringes upon freedom of expression in violation of the doctrine set forth in *Smith v. California, supra,* and, in light of the threat of perjury, the oath insures that the dissemination of ideas will be the loser. Thus, we submit that unconstitutional vagueness is presented by this case and that each and every definitional section of the 1955 oath is unconstitutional and should not be applied to appellants. (See, R. 67-9, 188, 195-6, 197, 215-18.)

To test the meaning of the 1931 oath, to establish its unconstitutional vagueness and uncertainty, and to expose it to the purity of language and concept, we here set forth the oath once again, giving definitions of its key words from *Webster's New Collegiate Dictionary,* (Merriam-Webster 1956), and then, as was done in *Lanzetta v. New Jersey,* 306 U.S. 451, at 456, we set forth the 1931 oath in accordance with what we believe is a reasonable explication:

A. The 1931 Oath—(RCW 28.70.150):

> "I solemnly swear (or affirm) that I will support the Constitution and laws of the United States of America and of the State of Washington, and will by percept and example promote respect for the flag and institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States."

B. Definitions of key words used in the 1931 oath.

Percept, n.

1. Any commandment, instruction, or order intended as a rule of action or conduct, esp., a practical rule guiding behavior, technique, etc.

Institutions, n.

3. That which is instituted as: a) an established practice, law, custom, etc.; b) an established society or corporation; an establishment, esp. one of a public character, a foundation, as charitable institution; also, the building or buildings used by such organization.

Reverence, n.

1. Honor or respect felt or manifested; deference;
2. Profound respect mingled with love and awe;
3. A gesture of respect, as an obeisance or curtsy.

Law

1. The binding custom or practice of a community; rules of conduct enforced by a controlling authority; also, any single rule of conduct so enforced.

Order

5. Conformity to law or discourse: public quiet;
7. Condition in general; normal state;
8. The prevailing mode of a period;
9. A rule or regulation made by competent authority; also, a mandate.

Undivided

Not divided; not separated or disunited; unbroken; continuous, whole.

Allegiance

1. The duty of fidelity to one's government or sovereign state;

2. Devotion or loyalty to that which is entitled to obedience, or service and respect.

C. Wording of the 1931 oath in accordance with the foregoing definitions.

"I solemnly swear (or affirm) that I will support the Constitution and laws of the United States of America and of the State of Washington, and will by commandment, instruction or order and example promote respect for the flag and established society practice, law and custom of the United States of America and the State of Washington, promote profound respect, mingled with love and awe and the normal state or condition in general and the prevailing mode of the period and I will give my continuous and whole devotion and loyalty to that which is entitled to obedience, the government of the United States."

D. Conclusion In re Vagueness.

The 1931 and 1955 oaths in our opinion are susceptible of a reasonable interpretation whereby persons pursuing free political discussion and association and engaging in action to seek that government be altered or modified in accordance with the will of the people will be liable to punishment or will suffer a credit and/or property loss, all of which results in the loss of liberty guaranteed for all our people, including teachers and employees at a great state university. The 1931 and 1955 oath statutes must fall (See *Stromberg v. California*, 283 U.S. 359, at 370.).

The 1931 and 1955 oath statutes are opposed to the Constitution of the United States, and this Court thus comes under a duty to exercise its judicial power to declare and enforce the supreme law residing in the United

States Constitution. It is no answer for the attorney general to state that these vague and ambiguous oaths contain scienter, and thus, scienter alone makes them definite and clear:

> "... where the overt act which constitutes the crime is insufficiently defined, a stipulation that the act must be done intentionally before it is unlawful is of no aid in determining what acts are fact within the definition. Furthermore, when the person affected is confronted with the borderline situation in which he has honest doubts as to the proper action, a resolution of the doubt in his own favor is often undistinguishable from a wilful evasion. Consequently the vagueness of the definition compel men to lean over backward in many circumstances in order to avoid imputations of the intent or bad faith specified in the statute. (Note, 26 Minn. L. Rev. 661-662.)

We believe the 1955 and 1931 oaths are unconstitutionally vague in their entirety and in each and every aspect under the cases cited in this brief, and particularly *Cramp v. Florida*, 368 U.S. 278, and cases cited therein, and that this Court should so hold.

IV.

The Oaths Are Bills of Attainder in Violation of the Constitutional Prohibition Thereof.

The oaths in question in this case are test oaths, punishing appellants legislatively without any adjudicatory process. The 1955 oath is expurgatory, and both oaths function, in this case, to deprive otherwise fully qualified and competent employees of their employment, good consciences and professional integrity.

In *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, at

320, this Court held that a statute depriving a person "of any rights, civil or political, previously enjoyed, may be punishment . . ." and constituted a bill of attainder. There can be no doubt that the statutes in this case infringe upon, and deprive appellants of "political" rights. In addition, tenure is a "right," and this Court has not considered state employment as a "privilege." Among the unconstitutional deprivations inflicted in *Cummings* were denials of the vote and the opportunity to hold office. In *United States v. Lovett*, 328 U.S. 303, denial of compensation for federal employment was held a sufficient deprivation to invalidate the statute as a Bill of Attainder.

The oaths in this case are not retrospective, but historically, Bills of Attainder need not be retrospective. As Mr. Justice Frankfurter pointed out in concurrence in *Lovett, supra*, at 323, "Frequently, a bill of attainder was thus doubly objectionable because of its *ex post facto* features. This is the historic explanation for uniting the two mischiefs in one clause—'No Bill of Attainder or *ex post facto* Law shall be passed.'" This was the court's view in *Cummings, supra*, *ex parte Garland*, 71 U.S. (4 Wall.) 333, and *Lovett, supra*.

Recently, the opinions of this Court have erroneously accepted the principle that in order to constitute a Bill of Attainder a statute must be *ex post facto* rather than having been designed to prevent future actions. See, *American Communications Association v. Douds*, 339 U.S. 382, and *Communist Party of the U. S. v. S. A. C. Board*, 367 U.S. 1 at pages 86-87. An excellent writing has fully demonstrated this Court's error:

> "It is, however, a principle belied by the history from which its proponents contend it was culled . . . some English bills of attainder were passed in order to prevent certain types of future conduct on the part of the person or group attainted . . . these historical examples demonstrate that the primary purpose of some pre-Constitution bills of attainder was to prevent certain types of future action on the part of the individuals attainted." (Comment, The Bounds of Legislative Specifications: A Suggested Approach to the Bills of Attainder Clause, 72 Yale Law J. 330 at 338-339 (1962.))

Thus, it is clear that the opinions of this Court on this subject employ conflicting rationale; some cases, after 1949, have taken a literal approach to the problem, and others have taken a functional approach.

We believe that (1) the writings contemporary with the adoption of the Constitution, and that (2) the pre-Constitutional bills of attainder show that a literal interpretation of this clause, including a requirement of *ex post facto* operation, is error. A broad functional purpose should dominate this Court's future judicial construction of this constitutional provision. (See, Comment, 72 Yale Law J. 330). Historically, test oaths, such as those at issue in this case, have been notorious bills of attainder, and they have been stricken by this Court whenever they "inflict punishment absolutely, or may inflict it conditionally" (*Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 342), i.e., as a condition of employment. We submit that this Court should return to its original, and historically correct, functional approach to the bill of attainder clause, and, in so doing, it should strike the 1931 and 1955 test

oaths, prescribed by the Washington legislature, as unconstitutional and void bills of attainder.

V.

The District Court Upheld State Statutes Which Are Void Because They Violate the Supremacy Clause of the Constitution and Interfere With Foreign Affairs and Attempt to Promote Loyalty to and to Regulate, Restrict and Proscribe Sedition Against the United States, a Field Entirely Within the Province of the Federal Government, and Which the Congress of the United States, by Legislative Enactments, Has Preempted and Wholly Occupied.

This Court has indicated that the Washington Legislature has no more constitutional discretion to command loyalty to the federal government as a condition of the employment of appellants, and others similarly situated, than it has discretion to command loyalty to the government of France. Such legislation infringes on the highest prerogative of the sovereignty of the federal government: the power to command the loyalty of its people. It alone may legislate on questions of *national* loyalty.

> ". . . The United States is not only a government, but it is a national government, *and the only government in this country that has the character of nationality.*" Mr. Justice Bradley concurring in *Knox v. Lee*, 79 U.S. (12 Wall.) 457, at 555. (Emphasis supplied.)

As Chief Justice Marshall stated in the case of *The Exchange*, 11 U.S. (7 Cranch) 116 at 135:

> "The jurisdiction of the nation within its own territory is necessarily *exclusive and absolute.* It is susceptible of no limitation not imposed by itself. *Any restriction upon it, deriving validity from an external source, would imply a diminution of its sov-*

ereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." (Emphasis supplied.)

In *Pennsylvania v. Nelson*, 350 U.S. 497 at 509, this Court unequivocally held that the Pennsylvania decision on review was "unassailable" in its holding that: "Sedition against the United States is not a *local* offense. It is a crime against the *Nation (id.* at 505). Thus, "Congress having . . . treated seditious conduct as a matter of vital national concern, it is in no sense a local enforcement problem." *(ibid).*

This Court reaffirmed its position in *Uphaus v. Wyman*, 360 U.S. 72 at 76:

". . . In *Nelson* itself we said that the 'precise holding of the court . . . is that the Smith Act . . . which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supersedes the enforceability of the Pennsylvania Sedition Act which proscribed the *same conduct.*'"

Thus, this Court, in *Uphaus*, has made it clear "that a State could proceed with prosecutions for sedition against the State itself" *(ibid)*, but that a state has no power to proscribe the same conduct against the United States, made criminal by the Smith Act.

It should be noted that the Washington Subversive Activities Act is broader than the Smith Act, and there

are many sections of both oath statutes under attack here that refer specifically to the United States and cover the same area and proscribe the same conduct prohibited by the Smith Act. It is clear that the State of Washington has no power to command anti-sedition, or undivided allegiance oaths viz-a-viz the United States, and that these portions of the oaths, referring to the United States, have been pre-empted. The District Court's inadequate paragraph on this point is manifestly in error, indicating that it did not reach the real issues, although they had been briefed and argued, when it decided the question:

> "The pre-emption argument based on *Pennsylvania v. Nelson*,[34] need not detain us long, on these facts. The Court's opinion in *Uphaus v. Wyman*[35] indicates that Nelson did not strip the states of the right to guard their own security and a state may legitimately make inquiry and investigate in this area."

The point is, however, that by enacting the 1931 and 1955 oath statutes, the Washington legislature has sought to guard the security of the government of the United States, which it has no power to do under *Pennsylvania v. Nelson*, as well as seeking to guard its own security. The 1931 and 1955 oath statutes are replete with references to the "government of the United States" and its "political subdivisions." *Pennsylvania v. Nelson* denies this power to the states. We think the District Court, below, committed clear error, and should be reversed, when it refused, over argument to the contrary, to strike, as unconstitutional, all references made by the 1931 and 1955

oath statutes to the government of the United States and its subdivisions.

There is yet another consideration, defeating the asserted state power. It concerns the power of a state to frustrate Congressional enactments providing for educational and cultural exchanges which promote good will abroad (22 U.S.C. 2451 et seq.). Does a state have constitutional power to require that the foreign professorial and research recipients of federal funds and good will, under Congressional enactments, must execute the 1931 and 1955 oaths as a condition of obtaining employment at the University of Washington?

That our federal government is heavily, and properly, involved in educational and cultural exchange programs cannot be doubted. A document entitled: Educational Exchange Grants, published in May, 1959, Revised No. 6789, by the United States Department of State, International Educational Exchange Service (Series 64), provides as follows at pages 24-25:

"MAJOR LEGISLATIVE AUTHORITY FOR THE PROGRAM

"Authority for carrying out the cultural exchange program described herein is derived from legislation enacted by the United States Congress. Dollar funds appropriated annually are used jointly with certain foreign currencies earmarked for educational purposes in the interest of economical administration as well as to expand the scope of the program.

"The principal laws are:

"*Public Law 402, 80th Congress,* as amended, the

United States Information and Educational Exchange Act of 1948 (the Smith-Mundt Act). It provides the basic authority for reciprocal educational exchange programs between the United States and other countries and authorizes the annual appropriations of funds by the United States Congress.

"*Public Law 355, 76th Congress,* an Act for Cooperation With the Other American Republics. It authorizes exchanges between the United States and the other American Republics.

"*Public Law 584, 79th Congress* (the Fulbright Act). It provides that certain foreign currencies owed to or owned by the United States as a result of surplus property sales abroad may be used to finance exchanges between the United States and certain foreign countries for study, teaching, lecturing, advanced research, or other educational activities. Pursuant to this legislation, executive agreements are negotiated with individual countries to provide for educational exchange programs.

"*Public Law 400, 82nd Congress* (the Mutual Security Act of 1952). It amends the Fulbright Act by providing for the use of educational exchange of foreign currency creditors owed or owned by the United States and not required by law or agreement to be expended or used for any other pupose.

"*Public Law 480, 83d Congress,* as amended (the Agricultural Trade Development and Assistance Act of 1954). It authorizes proceeds from the sale of surplus agricultural commodities for educational exchange programs established under other legislative authorizations including assistance to American-sponsored schools abroad.

"*Public Law 931, 85th Congress.* It amends the Agricultural Trade Development and Assistance Act of 1954 by authorizing the additional use of foreign currencies for providing assistance, in such amounts as may be specified from time to time in appropria-

tion acts, by grants or otherwise, in the expansion or operation in foreign countries of established schools, colleges, or universities founded or sponsored by citizens of the United States, for the purpose of enabling such educational institutions to carry on programs of vocational, professional, scientific, technological, or general education; and in the supporting of workshops in American studies or American educational techniques, and supporting chairs in American studies.

"*Public Law 265, 81st Congress.* It provides that part of the annual payment of Finland's World War I debt to the United States may be used for educational exchanges between the two countries. This act also provides for the interchange of scientific, technical, and scholarly books and laboratory and technical equipment between Finland and the United States.

"*Public Law 48, 82nd Congress* (The India Emergency Food Aid Act of 1951). It authorizes the use of certain sums, payable by the Government of India to the United States as interest on the emergency food relief loan, for educational exchanges between the two countris including the interchange of certain types of books and laboratory and technical equipment.

"*Public Law 665, 83rd Congress.* It authorizes the use of approximately 500,000 Irish pounds for scholarship exchange between the United States and Ireland.

"*Conventions.* The United States has also ratified the following two conventions which provide for cultural exchanges with Latin America:

"Convention for the Promotion of Inter-American Cultural Relations, signed at Buenos Aires, Argentina, in 1936.

"Convention on Inter-American Cultural Relations, signed at Caracas, Venezuela, in 1954."

The above document was published in 1959. However,

in 1961, by enacting the Fulbright-Hayes Act (Public Law 256, 87th Cong.—Mutual Educational and Cultural Exchange Act of 1961) Congress authorized educational exchanges for studies, research, instruction, and other educational activities. This Act consolidated the previous legislation, and created the United States Advisory Commission on International Education and Cultural Affairs.

Under 22 U.S.C. § 2452, the President is authorized "to provide, by grant, contract, or otherwise, for . . . . (1) educational exchanges, (i) by financing studies, research, instruction, and other educational activities . . . (B) of or for citizens and nationals of foreign countries in American schools and institutions of learning . . . and (ii) by financing visits and interchanges between the United States and other countries of . . . teachers, instructors and professors; . . ." The implementation of this power is found in Volume 22 of the Code of Federal Regulations. 22 CFR § 61 provides for payments to, and on behalf of, participants in the educational exchange program; § 61.4 specifically provides grants to foreign scholars so that they might lecture, teach, and engage in research or training, and § 63.1 includes teachers and professors under the Exchange-Visitor Program.

The actual functioning of these programs started in 1938, but it was not until 1946 that the programs became world-wide in their scope. ("A beacon of hope—The Exchange-of-persons program," a report from the U. S. Advisory Commission on International Educational and Cultural Affairs. April, 1963., p. 10, fn. 1.) At present, the International Educational Exchange Program extends

to more than eighty foreign countries ("Educational Exchange Grants," International Exchange Service, Bureau of Public Affairs, Department of State. May, 1959, p. 1) bringing under the Fulbright-Hayes Act 4,800 foreign students, teachers, professors, research scholars, leaders and specialists in different fields to the United States. (Annual Report 1962 by the United State Department of Health, Education and Welfare to the President of the United States, pp. 304-309.)

While the federal laws provide for grants to both United States and foreign citizens, our primary concern is directed to grants and interchanges involving foreign citizens who are professors and scholars, and who come to the United States to participate through employment by a state at its college or university. Under the Fulbright Act, only international transportation is paid for by federal funds. Usually the host institution provides employment compensation. ("Educational Exchange Grants," International Exchange Service, Bureau of Public Affairs, Dept. of State, May, 1959, p. 19.) Thus, for example, such persons would be "employees" of the University of Washington (R. 163), and required to execute the 1931 and 1955 oaths.

In 1961, the following grants were made to foreign citizens on an exchange program: Advanced research, 456; Teaching or teacher development, 705; University lecturing, 133. (Annual Report to Congress, Educational and Cultural Exchange program, July 1, 1960-June 30, 1961, Annual Report to Congress at page 65, Appendix A; for a breakdown by countries there are other charts in Ap-

pendix A.) In 1962 the foreign grantees were: Lecturers and Research Scholars, 621; Teachers, 736. (See footnote 1 at page 65 of Annual Report to Congress.)

Like many other universities, the University of Washington is a participant in the above federal programs. (See, e.g., "Open Doors 1957" and "Open Doors 1959," Institute of International Education at pages 31 and 34.)

Congress' purpose in providing for the educational and cultural exchanges has been set forth in 22 U.S.C. § 2451:

> "The purpose of this chapter is to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange."

Yet, the realization of this Congressional purpose surely will be defeated, or materially deterred, if a state legislature has constitutional power to require that foreign citizens who participate in these programs swear that "by precept and example" they will "promote . . . respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States," or that, as defined by the 1955 oath statute, they are not "subversive persons," nor are they members of "foreign subversive organizations," "subversive organizations," or of the communist party. No state legislature has such power under the supremacy clause. We ask that this Court hold that the 1931 and 1955 oath statutes to have been fully and completely pre-empted by Article VI of the United States Constitution.

VI.

The District Court Upheld the Washington Statutes Requiring Oath Forms A and B Which Are Void Under the Fourteenth Amendment's Due Process Clause, Protecting Appellants Against Compulsory Self-Incrimination.

A. Both the 1931 and 1955 Statutes Establish a Civil "Penalty" or "Forfeiture" Within the Scope of the Fifth Amendment Protection Against Self-Incrimination.

A cardinal tenet of the Anglo-American concept of procedural due process is freedom from self-incrimination. *United States v. White*, 322 U.S. 694, at 698-699 (dictum), and *Quinn v. United States*, 349 U.S. 155, 161-162 (dictum). Mr. Justice Field, dissenting in *Brown v. Walker*, 161 U.S. 591, at 637, declared:

> "The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration."

The state may not coerce the production of either testimony or effects from a party against whom—if produced—such evidence might lead to the imposition of a "forfeiture" or "penalty." *U. S. v. Collins*, 25 Fed. Cas. 545; *Boyd v. United States*, 116 U.S. 616; *Lees v. United States*, 150 U.S. 476.

Failure of appellants to execute oath forms A or B will result in loss of their tenure rights, good reputations, credit standing, and even their chosen livelihood for which many have spent years in preparation (R. 174, 176, 212). This result constitutes a "forfeiture" or "penalty" within the protection of the rule against self-incrimination. *Cohen v. Hurley*, 366 U.S. 117 at 145-149 (dissenting opinion);

35 Tul. L. Rev. 400 at 428 (1961). It is not enough to say that these statutes are not retributive in purpose or are aimed at preserving the State of Washington. Their substance and effect are punitive, and their purported motivation of public protection lies at the core of every criminal law. 35 Tul. L. Rev. 400, 414 (1961). The oaths serve no purpose other than invading constitutionally protected freedoms.

B. The 1955 Statute Is Void as Requiring Plaintiffs, and Others Similarly Situated, to Incriminate Themselves with Respect to Their Own Disloyalty.

Even if the civil jeopardy in which plaintiffs are placed upon presentation to them of the oath forms does not invoke the privilege against self-incrimination, surely potential conviction by the state for a criminal felony does. *Blau v. United States*, 340 U.S. 159; *Hoffman v. United States*, 341 U.S. 479. Yet, this eventuality is exactly what appellants, and others similarly situated, are subjected to by the 1951 statute, as amended, requiring that they execute the so-called "negative disclaimer." Chapter 377, Laws of Washington, 1955, amending Chapter 254, Laws of Washington, 1951 (RCW 9.81.070); the pertinent provision of which reads:

> ". . . Every such person, board, commission, council, department, court or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment."

Since a "subversive person" or member of the communist party or other "subversive" organization is defined *within the same statute* as constituting a felony (RCW 9.81.020-030) and since the avowed function of the legislation—as construed in *Nostrand v. Balmer*, 53 Wn.(2d) 460—is the removal of such "subversives from the state payroll," appellants and others similarly situated, who refuse to sign the oath would necessarily be providing a "link in the chain needed in a prosecution" under 9.81.020 of the Act, as well as under the Smith Act. *Blau v. United States*, 340 U.S. 159 at 161. Appellants are thus faced with a Hobson's choice. Either they must execute an oath which is vague in its scope (an act in itself offensive to them, causing them emotional anguish in that they must compromise their consciences) and thus face, either because of professional activities or intellectual belief, the genuine possibility of prosecution for perjury by a zealous state, or appellants may choose to refuse to execute the oath, thus facing immediate dismissal, the suspicion of their contemporaries, the taint of disloyalty, and—by their own act of refusal—the possibility of prosecution by a zealous state for the felony of being a "subversive person." There is no middle ground. There are no reservations. There is no opportunity given for explanation by either the statutes commanding the "1931 oath" or those commanding the "1955 oath."

That this probability is a realistic one is corroborated by this Court in *Cramp v. Florida*, 368 U.S. 278, at 286-287. This Court looked to peripheral activity such as that engaged in professionally by appellants:

> ". . . While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behavior. It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human."

and in *Slochower v. Board of Education*, 350 U.S. 551 at 557-558:

> ". . . [A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The deficiencies of the process are even more constitutionally repugnant as (a) there are other means available, and used, by the state for determining the qualifications of its employees at the University of Washington other than the ritual under consideration, and (b) as shown by appellants in their evidence, the signing or non-signing by them of the ritual has no rational bearing on their fitness to teach. The latter consideration distinguishes this case from the disbarment cases, and from the secondary school teacher cases.

The states do not have "free reign . . . in the choice of means of forcing incriminatory testimony . . ." *Cohen v. Hurley*, 366 U.S. 117 at 129. The "1955 Oath," with the moral, professional and legal compunctions which it presents to the affiant, is certainly such a case where the legislature has strayed beyond its constitutional bounds.

We submit the time has come for this Court fully to incorporate the privilege against self-incrimination into the due process clause of the Fourteenth Amendment, and, in its application to this case to hold the 1931 and 1955 oath statutes unconstitutional and of no force and effect.

VII.

The District Court Improperly Refused to Declare Constitutional Rights of Appellants Regarding the 1931 Oath and Committed Error in Dismissing Appellants' Complaint With Prejudice.

A. The District Court Committed Error in Not Declaring Appellants' Constitutional Rights Regarding the 1931 Oath.

It is not clear whether the lower court invoked the abstention doctrine. It appears that the lower court believed it had absolute power to grant or deny declarative relief. In either event, this Court has made it absolutely clear that a United States District Court does not have untrammeled discretion to grant or deny declaratory relief, or automatically to invoke the doctrine of abstention, simply because the constitutionality of an unconstrued state statute, or an ambiguously worded state statute, is called into question. This much was implicit in *Harrison v. NAACP*, 360 U.S. 167, and this Court made the matter explicit in *NAACP v. Bennett*, 360 U.S. 471, and see, *Romero v. Weakely*, 226 F.(2d) 399 (C.A. 9th Cir. 1955). Nor has this court required that a complaint be dismissed when such questions arise. This has been clear since *Doud v. Hodge*, 350 U.S. 485 at 487:

> "This Court has never held that a district court is without jurisdiction to entertain a prayer for an

> injunction restraining the enforcement of a state statute on grounds of alleged repugnancy to the Federal Constitution simply because the state court had not yet rendered a clear or definitive decision as to the meaning of federal constitutionality of the statute."

Given the above holdings, and *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, it is obvious that a District Court cannot, without committing error and abusing its discretion, refuse declaratory relief and invoke the doctrine of abstention where the legislative language is clear or where only one reasonable interpretation of the words is possible. In these circumstances it is the duty of the District Court to decide the constitutional question. *Toomer v. Witsell*, 334 U.S. 385. This duty is the logical corollary of the holding in *Harrison v. NAACP*, 360 U.S. 167. Moreover, this is precisely what has been done in *Schempp v. School District of Abington*, 177 F. Supp. 398 (E. D. Pa. 1959), without adverse criticism from this Court, 364 U.S. 298.

Even more so is it the duty of a District Court to decide the constitutional question presented to it when the District Court itself has concluded that the statutory language is clear, as the lower court did in this case with respect to the denial of a hearing and the summary operation of Section 4 of the 1931 oath statute. The lower court declared:

> "In view of the mandatory language there can be little doubt that dismissal or ineligibility must necessarily and automatically result from refusal of a teacher to sign this oath."

We submit, therefore, that the District Court committed

error and abused its discretion when it refused a declaration on the constitutionality of Section 4 of the 1931 oath enactment.

Furthermore, we submit that the lower court viewed its power as extending so far as to deny its own jurisdiction, and further, to invoke abstention as untrammeled and without boundaries, including the power to defeat the very purpose of the Declaratory Judgment Act, the jurisdictional statutes: 28 USC 1331 and 1343 (3), and the civil rights statute 42 USC 1983 involved in this case. The lower court stated that the granting of declaratory relief was a matter of sound discretion committed to the District Courts, and:

> "Accordingly, in the absence of a concrete factual showing that any plaintiff or any member of the class of state employees here represented *has suffered actual injury by reason of the application* of the oath of allegiance statute . . . this court will decline to render a declaratory judgment . . ." (Emphasis supplied.)

Since a declaratory judgment action necessarily must be brought before "actual injury by reason of the application" of the oath to appellants, the District Court has set an impossible burden upon their shoulders. Appellants cannot show *actual injury* before the statute has been actually applied to them. Yet, appellants cannot obtain a declaration of rights, under this ruling, without subjecting their rights to actual injury. Thus, the position of the District Court completely defeats the purpose of Congress when it enacted the jurisdictional statutes, the civil rights statute, and the Declaratory Judgment Act.

> "One of the highest offices of declaratory procedure is to remove uncertainty and insecurity from legal relations, and thus clarify, quiet and stabilize them before irretrievable acts have been undertaken." *(Delaney v. Carter Oil Co.*, 174 F.(2d) 314 at 317 (C.A. Okl. 1949), cert. den. 338 U.S. 824.)

This is also the view of the Ninth Circuit:

> "The purpose of the Declaratory Judgment Act is to afford an added remedy to one who is uncertain of his rights and who desires an early adjudication thereof without having to wait until his adversary should decide to bring suit, and to act at his peril in the interim." *(Shell Oil Co. v. Frusetta,* 290 F.(2d) 689 at 692 (C.A. 9th Cir. (1961)).

We submit that the lower court abused its discretion when it abandoned this view and that it committed error in refusing to rule on the constitutionality of the 1931 oath statute for the reason that appellants had not yet shown any actual injury.

In addition, we submit that the following words with respect to the 1931 oath are clear and can have only one reasonable interpretation, and that the lower court forthrightly should have ruled this oath unconstitutional as an infringement upon the First and Fourteenth Amendments, and the Supremacy clause:

> "I solemnly swear . . . that I will . . . by precept and example promote . . . undivided allegiance to the government of the United States."

Indeed, the District Court itself must have believed that these, and other, words of the 1931 oath were clear because at the beginning of its opinion on the 1931 oath, the court refers back to its discussion of the First Amend-

ment with respect to the 1955 disclaimer oath. It stated that:

> "Insofar as the arguments heretofore considered with respect to the loyalty oath are advanced also in connection with the attack on the validity of the oath of allegiance statute, the preceding discussion of the points raised is applicable."

We submit that the lower court did not invoke abstention on these points and that it ruled erroneously on the substantive questions. However, if it be the view that the lower court did invoke abstention, then, we submit that it abused its discretion in so doing, as the above quoted paragraphs clearly demonstrate and that it should now be reversed. *NAACP v. Bennett*, 360 U.S. 471; *Toomer v. Witsell*, 334 U.S. 385, and *Cf. Chicago v. A. T. & S. F. Ry.*, 357 U.S. 77.

B. The District Court Committed Error in Dismissing Appellants' Complaint Assuming, Arguendo, That Abstention Was Properly Invoked.

The doctrine of abstention does not raise a question of power, but rather, a question of judicial discretion. *Catoggio v. Grogan*, 149 F. Supp. 94 (D.C. New Jersey 1959). The doctrine is designed to serve the purposes of comity, allowing a state court to resolve questions of statutory construction, where state statutes are reasonably and fairly open to doubt. But, as this Court has declared:

> ". . . This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise; it serves the policy of comity inherent in the doctrine of abstention; . . ." (*Harrison v. NAACP*, 360 U.S. 167 at 177).

Thus we submit that the District Court committed error when its final order certified that appellants' "complaint be and it hereby is dismissed with prejudice."

VIII.

Washington's Legislature Has No Constitutional Power to Disqualify Every Citizen Absolutely From the Profession of Teaching, Public and Private, on the Sole Ground That He Has Refused to Execute the Oath of Undivided Allegiance.

It is beyond doubt that the profession of teaching is an old, honorable and lawful one, and that its calling is within the "liberty" protected from unwarranted deprivation by the Due Process clause of the Fourteenth Amendment:

> "Plaintiff in error taught this language [German] in school as part of his occupation. His right thus to teach and the rights of parents to engage him so to instruct their children, we think, are within the liberty of the (Fourteenth) Amendment." (*Meyer v. Nebraska*, 262 U.S. 390 at 400 and see, *Farrington v. Tokushige*, 273 U.S. 284, and *Pierce v. Society of Sisters*, 268 U.S. 510.)

Appellants admit, as indeed they must, that Washington may submit the profession of teaching to regulations, but those regulations must be reasonable and rationally connected with fitness for teaching. *Douglas v. Noble*, 261 U.S. 165; *Schware v. Bd. of Bar Examiners*, 353 U.S. 232 at 239, footnote 5.

In this case, the oath requires that all teachers have closed minds on certain subjects, e.g. allegiance to government, regardless of their consciences or religion. We

submit that such a requirement cannot constitute a rational relationship to fitness for the profession of teaching. This Court declared as much in *West. Va. v. Barnette*, 319 U.S. 624.

In the *Barnette* case, this Court disallowed States power to compel children to pledge allegiance to the flag of the United States. Making a sharp distinction between education and indoctrination, this Court defined the question there as follows:

> "'. . . the State may require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guarantees of civil liberty which tend to inspire patriotism and love of country . . . Here, however, we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to arouse loyalties constitutionally may be a short-cut by substituting a compulsory salute and slogan. . . .'" (At p. 631)

If a state cannot require its school children compulsorily to perform this act of allegiance (albeit not "undivided"), we submit that it cannot be said that a broader and more severe oath, the 1931 oath, is a rational qualification for teachers. Even if the oath were rational for first grade teachers, which we do not admit, appellants are university professors whose function it is to inspire their students toward the discipline of an unfettered search for truth, no matter what conforming idolatry might be shattered in the process.

". . . But freedom to differ is not limited to things

> that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." *West Va. v. Barnette*, 319 U.S. 624 at 642.

To hold that the 1931 oath, however construed, is rationally related to the fitness of a university professor is to deny religious and academic freedom, and to make a mockery of our great universities. The irrelevance of this oath to fitness to teach at the university, indeed its hostility to true qualifications of fitness, is clearly revealed by the past practice of university administrators.

We submit that the District Court should be reversed and that reversal is not foreclosed by such cases as *Konigsberg v. State Bar*, 366 U.S. 36; *In re Anastaplo*, 366 U.S. 82, or *In re Summers*, 325 U.S. 561, which relied upon *U.S. v. Schwimmer*, 279 U.S. 644, *and U.S. v. Macintosh*, 283 U.S. 605, and which were overruled in *Girouard v. U.S.*, 328 U.S. 61.

IX.

The Interest of Student-Appellants in Academic Freedom Is Adequate to Afford Them Standing to Sue.

This Court has recognized that academic freedom is protected by the First and Fourteenth Amendments, and that a professor has standing to invoke those Amendments when his interest in academic freedom is unwarrantedly infringed upon by a state. *Sweezy v. New Hampshire*, 354 U.S. 234. Furthermore, this Court, rightly, has recognized that academic freedom has two sides and that it necessarily involves students as well as professors.

> ". . . When academic teaching-freedom *and its corollary learning-freedom*, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion . . . *into this constitutionally protected domain.*" (*Barenblatt v. U.S.*, 360 U.S. 109 at 112) (emphasis supplied)."

Despite the above, the District Court, in its Order on Motion to Dismiss, dismissed the student-appellants from this action. Yet, this case directly affects the quality of learning-freedom afforded students at the University of Washington. However, the lower court held that the student-appellants had "no direct legal interest in the requirement imposed on the teaching personnel." In so doing it cited three cases, none of which was discussed, nor was its citation of any apposite.

The District Court did not discuss, distinguish, or determine why the following cases, supporting student standing and argued to it, were not applicable to this case: *Engel v. Vitale*, 370 U.S. 421 (parents allowed to assert the rights of their children to attack a prayer required in the schoolroom); *Adler v. Bd. of Ed.*, 342 U.S. 485 (the parental assertions of the rights of their children in academic freedom were put forth to contest the validity of New York's Feinberg Law which was upheld by this Court over a dissent by Mr. Justice Frankfurter wherein he would have denied review on the basis of their lacking an interest to afford standing); *Hamilton v. Bd. of Regents*, 293 U.S. 245 (students at a state university had standing to contest a mandatory ROTC program); *Pierce v. Society of Sisters*, 268 U.S. 510 (the society asserted the constitutional rights of students to be educated in a private

sectarian school); *Waugh v. Bd. of Trustees*, 237 U.S. 589 (student who applied for admission had standing to challenge a university's ban on fraternal allegiance).

In *Shelton v. Tucker*, 364 U.S. 479 at 487, this Court declared that "the vigilant protection of constitutional freedoms is nowhere more vital than in the Community of American schools." And in another significant case, this Court said:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers *and students* must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." (emphasis supplied). *(Sweezy v. New Hampshire*, 354 U.S. 234 at 250).

We submit that the oaths in this case create "an atmosphere of suspicion and distrust," particularly when a student's testimony might be the subject of subpoena and afford a link in the evidence offered in a prosecution of his professor for falsely signing these oaths. Thus, there is an infringement upon both aspects of the constitutionally protected domain of academic freedom. Inevitably, these oaths, if applied, will shrink the domain of learning-freedom afforded students at the University of Washington. We believe that the student interest in academic freedom in this case is substantial; that it affords them standing to sue, and that the lower court's ruling to the contrary should now be reversed.

CONCLUSION

The issues presented in this case go to the heart of democratic processes in America. Today, when man has so much to learn about himself and his neighbors, it is vitally important to keep open the channels of academic and public discussion concerning the vital and troublesome questions which face the people of our nation in these difficult times. If upheld, the exercise of power by Washington's legislature in demanding the oaths in question here will block discussion of vital issues in the academic community where novel ideas and bold plans must be generated and evaluated. No legitimate interest of the state justifies the breadth of suppression of free expression, and the curtailment of the search for truth, which will occur if these oaths are applied to the University of Washington.

Universities and colleges do not possess or teach the whole truth. They are engaged in the quest for truth. For that reason their scholars must be left free to examine all facts and ideas, the unpleasant, the distasteful, and the dangerous ones, and even those regarded as erroneous by a majority of the Washington legislature. If a professor's theories fail to encompass the whole truth and do not conquer in detail every nuance of his subject, they may, nevertheless, profoundly broaden and alter the picture given by the last scholar in the field.

To a scholar, unchallengeable dogma and hypothesis are fundamentally incompatible with the very life spirit of a university. "The concern of its true scholar is not merely to add and revise facts in relation to an accepted

framework, but to be ever examining and modifying the framework itself." *Sweezy v. New Hampshire*, 354 U.S. 234 at 263 (concurring opinion). Some people believe that communists have become prisoners of dogma and no longer are intellectually free. Hence, these people argue that communists are unfit to teach at a university and can be excluded from the company of true scholars. This test may have some validity. But, if it does, by that same token, every professor who subscribes by oath or affirmation to the body of beliefs and dogmas officially, but unconstitutionally, set forth by the Washington legislature in the two enactments in issue in this case is likewise a prisoner of dogma. He is not intellectually free, and should be disqualified from teaching at a university for the same reason that a communist is disqualified.

Since early times, loyalty oaths, such as the 1931 and 1955 oaths involved here, have taken the form of tests of religious orthodoxy as well as secular conformity, and they have always been backed up with potent sanctions. (Hyman, To Try Men's Souls: Loyalty Tests In American History (1959).) Throughout history, loyalty oaths have appeared in times of crisis; the framers of such oaths having assumed that all men agree on what loyalty is, (but see, Grodzins, The Loyal And The Disloyal: Social Boundaries of Patriotism And Treason (1956)). There can be no doubt that our Nation currently is in an age of crisis crisis and transition, and thus, the appearance of test oaths can be expected. But, they are inimical to freedom. We think that if academic freedom were fully and completely to receive its due, rather than constrained by these oaths, then, our Nation's transitions will be made easier for our

society. For example, our Nation is sorely in need of fearless, intellectual guidance which will help adjust our race relations so they will comport with the ideals of our Constitution. But, power of a state legislature to prescribe oaths and affidavits, see *Shelton v. Tucker*, 364 U.S. 479, which must be executed as conditions of professorial employment, can be used to bar professors and teachers from effectively bringing their talents to bear on this critical social problem. We believe that the guaranty of the First Amendment "is not confined to the expression of ideas that are conventional or shared by a majority." *Kingsley Int. Pictures v. New York*, 360 U.S. 684, 689. Today, our society needs independent universities with fearless professors and researchers just as much as it needs independent judges. "The government pays judges, but it does not tell them how to decide. An independent . . . university is as essential to the community as an indepedent judiciary." (Chaffee, The Blessings of Liberty (1956), p. 241, n. 2.)

Academic freedom is not only, at bottom, a matter of a professor's freedom peaceably to speak his mind. That freedom is involved, and it is crucial, but it is afforded to every American. Academic freedom is also, and perhaps more fundamentally, the freedom of the academic community to employ, or otherwise bring before it, and associate with, anyone whose ideas and opinions, popular or hated, it may think of unique interest or importance. Academic freedom is a part, and a very important part, of the freedom of our sovereign people to educate themselves for the responsibility of governing themselves, and as such, academic freedom is decidedly with the protec-

tion of the First Amendment to the Constitution of the United States.

In the field of public discussion, when citizens and their fellow thinkers "peaceably assemble" to listen to a speaker, whether he be American or foreign, conservative or radical, safe or dangerous, the First Amendment is not only, in the first instance, concerned with the "right" of the speaker to speak, and to say this or that. Rather, the First Amendment is concerned with the listeners as well. It protects the authority of the hearers peaceably to meet together, to discuss, and to hear discussed by speakers of their own choice, whatever they may deem worthy of their consideration. Thus, if for any reason, a man who is otherwise competent and qualified, on grounds of substantive merit in his discipline, is chosen to speak to, or is chosen to join an academic community, as professor or guest lecturer, and is prevented from doing so, then, it is the liberty and freedom of the academic community as a whole that has been abridged and violated. That violation is precisely what Chapter 103, Laws of Washington, 1931, and Chapter 377, Laws of Washington, 1955, amending the Washington Subversive Activities Act, Ch. 254, Laws of Washington, 1951, seek to accomplish by depriving appellants and their associates in the academic community, on non-substantive grounds, of their freedoms of expression and conscience.

As such, we ask this Court to declare and adjudge that the aforementioned laws, and their required oaths, on their faces, and as they have been sought to be applied to appellants herein, are unconstitutional, void and of no

effect, and that the District Court, below, be reversed, and that appellees, and their successors, permanently be enjoined from further enforcing, operating and executing such statutes, and their required oaths, and that appellants be granted costs, and other equitable relief as may be proper.

Respectfully submitted,

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APPENDIX A

UNITED STATES CONSTITUTIONAL PROVISIONS, STATE STATUTES AND OATHS INVOLVED

I.

UNITED STATES CONSTITUTION

Article 1, Section 10: "No State shall . . pass any Bill of Attainder, ex post facto law, . . ."

Article VI: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Amendment 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V: "No Person shall . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or propert , without due process of law; . . ."

Amendment XIV, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

II.

THE 1931 ENACTMENT: Chapter 103, Laws of Washington, 1931.:

"Section 1. That every person applying for a license to teach or renewing an existing contract, in the State of Washington, shall take and subscribe to the following oath or affirmation:

"'I solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order and undivided allegiance to the government of the United States.'

"No license to teach in the State of Washington shall be issued, or contract, or renewal thereof, signed by any school board, unless it shall affirmatively appear on said license or in said contract, or renewal thereof that such teacher has taken, subscribed and filed therewith the foregoing oath or affirmation.

"Sec. 2. Every professor, instructor or teacher, who shall be employed hereafter or whose contract may be renewed by any state institution of higher education, or any school supported in whole or in part by public funds, or is entirely or in part exempt from taxation, shall before entering upon the discharge of his or her duties subscribe to the oath or affirmation prescribed in section 1 before a person authorized by law to administer oaths and/or affirmations, such oath or affirmation to be executed in

duplicate and one copy filed with the head of such institution and the other retained by such deponent.

"Sec. 3. The clerks of school boards are hereby authorized to administer the oath required by this act.

"Sec. 4. It shall be unlawful for any person authorized to issue license to teach or any school board to hereafter issue any new license to teach in the state or execute any contract or renewal thereof with any person or persons who fail or refuse to execute the oath or affirmation herein provided, and any contract executed or renewed or license issued in violation hereof shall be and is hereby declared to be null and void.

"Sec. 5. If any section of this act shall for any reason be held invalid, that such construction shall not affect the other provisions herein contained not expressly invalidated.

"Sec. 6. The oath herein provided shall be required of all teachers whose contracts are renewed or executed from and after March 1, 1931.

"Passed the Senate March 4, 1931.

"Passed the House March 10, 1931.

"Approved by the Governor March 20, 1931."

III.

THE 1955 ENACTMENT: Chapter 377, Laws of Washington, 1955, Amending Chapter 254, Laws of Washington, 1951 (The Subversive Activities Act):

A. By Chapter 377, Laws of 1955, the 1951 enactment was amended by adding two new sections and amending Sec. 12 (RCW 9.81.010) (Amendatory language of the 1955 Act has been set forth below in italics):

"SECTION 1. Section 12, Chapter 254, Laws of 1951, and RCW 9.81.070 are each amended to read as follows:

"Every person and every board, commission, council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. *Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment.*" (RCW 9.81.070.)

"SEC. 2. Section 13, Chapter 254, Laws of 1951, and RCW 9.81.080 are amended to read as follows:

"The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment *and the requirement set forth in section 1 of this amendatory act, relative to membership in the communist party or other subversive organization,* shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof.

"SEC. 3. *For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive Order No. 9835.* (Held unconstitutional by the Washington Court).

"SEC. 4. *The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder.*" (RCW 9.81.083).

B. Chapter 254, Laws of Washington, 1951 (RCW 9.81 *et seq.*) (The definitional sections of the 1951 Act, incorporated into the 1955 Act, Chapter 377, Laws of Washington, 1955, are set forth below):

Subversive Person Ineligible for Public Employment.

"No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state." (RCW 9.81.060)

Definition of Subversive Person, Subversive Organization, and Foreign Subversive Organization.

"'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or any political subdivision of either of them by revolution, force, or violence; or who with knowledge that the organization is an organization as described in subsections (2) and (3) hereof, becomes or remains a member of a subversive organization or a foreign subversive organization. (RCW 9.81.010 (5))

"'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet,

advise, or teach activities intended to overthrow, destroy, or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence. (RCW 9.81.010 (2))

"'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual." (RCW 9.81.010 (3))

Communist Party Declared to be Subversive Organization.

"The Communist party is a subversive organization within the purview of chapter 9.81 and membership in the Communist party is a subversive activity thereunder." (RCW 9.81.083) (Added in 1955).

Oath Required of Employees of State of Washington.

". . . Every such person, board, commission, council, department, court, or other agency shall require every

employee or applicant for employment to state under oath whether or not he or she is a member of the Communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment." (RCW 9.81.070)

IV.

OATH FORMS A AND B

Oath Form A

STATE OF WASHINGTON

Statement and Oath for Teaching Faculty of the University of Washington

I, the undersigned, do solemnly swear (or affirm) that I will support the constitution and laws of the United States of America and of the state of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the state of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

I further certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070; and RCW 9.81.083, which are printed on the reverse hereof; that I understand and am familiar with the contents thereof; that I am not a subversive person as therein defined; and

I do solemnly swear (or affirm) that I am not a member

of the Communist party or knowingly of any other subversive organization.

I understand that this statement and oath are made subject to the penalties of perjury.

.....

(Signature)

.....

(Title and Department)

Subscribed and sworn (or affirmed) to, before me this .....day of ....., 19.....

.....

Notary Public in and for the State of Washington, residing at .....

(To be executed in duplicate, one copy to be retained by individual.)

NOTE: Those desiring to affirm may strike the words "swear" and "sworn to" and substitute "affirm" and "affirmed," respectively.

Oath Form B

STATE OF WASHINGTON

Statement and Oath for Staff of the University of Washington Other Than Teaching Faculty

I certify that I have read the provisions of RCW 9.81.010 (2), (3), and (5); RCW 9.81.060; RCW 9.81.070, and RCW 9.81.083 which are printed on the reverse hereof; that I understand and am familiar with the con-

tents thereof; that I am not a subversive person as therein defined; and

I do solemnly swear (or affirm) that I am not a member of the Communist party or knowingly of any other subversive organization.

I understand that this statement and oath are made subject to the penalties of perjury.

.....

(Signature)

.....

(Title and Department or Office)

Subscribed and sworn (or affirmed) to before me this .....day of ....., 19.....

.....

Notary Public in and for the State of Washington, residing at .....

(To be executed in duplicate, one copy to be retained by individual.)

NOTE: Those desiring to affirm may strike the words "swear" and "sworn to" and substitute "affirm" and "affirmed" respectively.

APPENDIX B

Relevant Minutes of the Meeting of the Board of Regents, University of Washington, May 25, 1962:

MINUTES
MEETING OF BOARD OF REGENTS
UNIVERSITY OF WASHINGTON
May 25, 1962

The Board of Regents met in executive session beginning at 9:30 a.m., Friday, May 25, 1962, in the Regents' Room on the University of Washington campus. The open meeting began at 3:00 p.m.

Present were Regents Bullitt, Drumheller, King, Little, Murphy, Shefelman, and Willis; President Odegaard and Secretary Hoagland. Also present were Mr. Conrad, Mr. Harlocker, Mr. Look, Dr. Schram, Dr. Thieme, and Mr. Wageman. Mr. Little was present for most of the morning session and was excused from the afternoon session because of his commitments relating to Secretary Dean Rusk's visit to Seattle.

Due regular and usual notice of this meeting had been given to the press, radio, television, and the public by Mr. Irwin S. Blumenfeld as appears from his affidavit in the files of the Secretary's office.

MINUTES OF THE PREVIOUS MEETING

The minutes of the April 27, 1962 meeting were approved as circulated to the members of the Board in advance of this meeting.

ACADEMIC AFFAIRS

* * *

LOYALTY OATH AND OATH OF ALLEGIANCE

President Odegaard reported to the Board that the University had been advised by the Office of the Attorney General of the State of Washington that pursuant to the decision of the Supreme Court of the United States there had been dissolved the restraining order which had the effect of suspending the requirements as provided by state law that all employees should sign the loyalty oath and that the teaching faculty should sign in addition the oath to support the constitution.

He stated that like every other board, commission, council, department, court or other agency of the State of Washington, the Board of Regents is required by state law to use procedures designed to ascertain whether a person employed by it is a subversive person and to require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization. The Office of the Attorney General has provided an approved form of statement and oath to carry out the statutory requirements.

It was noted that the law further provides that "refusal to answer on any grounds shall be cause for immediate termination" of employment. To enable the Board of Regents to acquit itself of the responsibility placed upon it by law, President Odegaard stated that he will request a check of the personnel records of the University so that

those persons who have not previously sworn to the required oaths may be requested to do so. They will receive letters of request as soon as possible but surely no later than September 15, 1962. Since the end of the academic year will be reached in a few days and a substantial number of persons will go off the University payroll for the summer and may not even be in Seattle, he recommended that compliance be requested by October 1, 1962, with notification that employment will be terminated 30 days later, as of October 31, 1962, unless a delay in taking action to terminate seems reasonable because of causes other than intentional refusal to sign.

Upon the recommendation of the Educational Policy Committee the Board of Regents approved the schedule recommended by the President of the University and in addition adopted the following statement:

If any member of the faculty having tenure should fail to comply with the state requirements, be given notice of termination of employment, and appeal to the tenure committee, it should be indicated that the grounds for termination are failure to comply with a provision of Washington state law which is binding upon the Board of Regents.

Attention should be directed to Section 2511 of the Faculty Code and to the underlined portion thereof:

> "The University of Washington Regents accept in principle the concept that tenure for members of the faculty is essential for effective teaching and sustained productivity in scholarship.
>
> "They furthermore accept in principle the concept

that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, maintaining and retaining, however, the responsibilities and obligations of the Board of Regents as defined in the laws of the State of Washington."

In accepting in principle the concept of tenure and acting within the area of discretion available to it, the Board of Regents seeks to follow the customs of tenure described in Chapter 25 of the Faculty Code. The Board, however, cannot set aside the responsibilities and obligations imposed upon it by the laws of the State of Washington and, therefore, cannot waive requirements as to employment specifically set by law with reference to the execution of the statement and oath.

FINANCE COMMITTEE